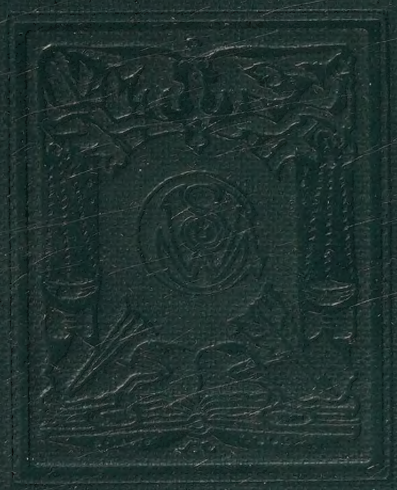

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ENCYCLOPÆDIA

OF THE

LAWS OF SCOTLAND

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OF THE

LAWS OF SCOTLAND

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VOLUME I

ABSOLUTE DISPOSITION TO ARRESTMENT

The Law is stated as at 31st July 1926

EDINBURGH:

W. GREEN & SON, LIMITED

LAW PUBLISHERS

1926

PRINTED IN GREAT BRITAIN BY
NEILL AND CO., LTD.,
EDINBURGH.

August 1926

PREFACE.

I HAVE been asked by the Editor and Publishers to write a few words of introduction to the present work. The idea of an *Encyclopædia of the Laws of Scotland* may be said to have had its genesis in Bell's *Law Dictionary*, first published in 1838. That, however, was rather fitted for the student than the practitioner. In successive editions, though substantial enlargement was accomplished, the idea was still to preserve the original words as endowed with the great authority of Mr Bell, in the same way as has been done in the successive editions of the *Principles*. The larger aim of compiling a work which should help the practitioner, and especially the country practitioner who has not at his hand an extensive law library, to see exactly how the law stands on any particular subject, was inaugurated, so far as Scotland was concerned, in the first edition of the work of the present publishers which appeared in 1896. This was followed by a new edition greatly augmented and enlarged in 1909. A book of this class, however well the task of its compilation has been accomplished, must submit to the inevitable fate of becoming out of date. "Noting up" is a process which is beyond all but the laborious and meticulous few. The ordinary practising lawyer has neither the heart nor the leisure for such a task. It therefore needs no explanation to understand that the time has come for a new edition. But as affecting such a publication there has been since the date of the last edition a very important fact, the appearance of Halsbury's *Laws of England*. It is explained in the preface to that book that its object is to provide by unofficial and unauthoritative work arranged in a series of treatises what might be done by codification. Being unofficial, it may be added, it escapes the congenital curse of codification, perpetual argument on what is the exact meaning of the words that now become binding in law. The book itself was so efficiently written that it might occur to some to question whether the field was any longer open. The answer is the simple one that the present work is intended to be the presentment of the Scottish law as such; and that though in many branches they overlap, yet the English and Scottish systems are not identical. The history of the citation of English authority in the Court of Session is not without interest. Though Bell had in his great works made ample use of English law, yet for some time

after that the older school of Scottish judges simply loathed the citation of English cases. They might well be excused; for that was long before the Judicature Act, when the kernel of legal principle was too often embedded in the husk of forms of action. There is no truth more difficult to bring home to the Scottish lawyer than that under the old system of the common law of England the right depended on the existence of the remedy, and not the remedy on the existence of the right. But all that was changed by the Judicature Act. Then came the publication of the authorised English Law Reports, which made the possession of those reports easy to those who lived in Scotland. For as a matter of fact it will never be found that an adequate citation of authority is made unless the authority finds its place in the private library of the practising lawyer. I can give a curious illustration. Never at the Bar or on the Bench in Scotland have I heard a citation from the Indian Law Reports. They are published as a separate section of the Law Reports, and are naturally not subscribed for by the Scottish advocate. Yet though, doubtless, the general bulk of the contents deal with other systems, there are in them many cases illustrating general principles with the authority of such names as Cairns, Selborne, Herschell, Watson, and Macnaghten, which might well be utilised on appropriate occasions. More recent legislation in some instances embodied a determined view to assimilate the two laws, as *e.g.* in the Sale of Goods Act. Further, there were statutes which from the very beginning were applicable to both countries alike, *e.g.* the Companies Acts. The result has been that certainly since the date of the cases arising out of the failure of the City of Glasgow Bank, the citation of English cases in the Court of Session has been a matter of daily occurrence. The present compilation fully recognises that fact, and it will be found that though it admittedly only seeks to set forth the law of Scotland, that law will be illustrated by copious citation of English authority.

As I have only acted as Consultative Editor, I am not responsible for the articles themselves. Equally, I am not entitled to share in the credit which I feel sure will be awarded when the publication is finished and can be subjected to the test of practical use.

DUNEDIN.

31*st July* 1926.

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TABLE OF ABBREVIATIONS USED IN THIS WORK.

The Scottish Text-Books and Reports are in italics.

A.C.	Appeal Cases, Law Reports, 1891 to date.
Abr. Ca. Eq.	Abridgment of Cases in Equity.
Act.	Acton's Reports, 2 vols., 1809–1811.
Act Ass.	*Acts of the General Assembly of the Church of Scotland*, 1638–1842, 1 *vol.*, 1843.
Act. Reg.	Acta Regia.
A. & E.	Adolphus and Ellis' King's Bench Reports, 12 vols., 1834–1840.
Adam (A.S.)	*Adam's Acts of Sederunt and Acts of Adjournal*, 1886.
Adam	*Adam's Justiciary Reports*, 2 *vols.*, 1893–1916.
Add.	Addams' Ecclesiastical Reports, 3 vols., 1822–1826.
Alison	*Alison's Criminal Law of Scotland.*
Amb.	Ambler's Chancery Reports, 2 vols., 1737–1783.
Am. St. Rep.	American State Reports.
Andr.	Andrews' Reports, 1 vol., 1738–1740.
Anst.	Anstruther's Exchequer Reports, 3 vols., 1792–1797.
App. Cas.	Law Reports, Appeal Cases, 1875–1890.
Arkley	*Arkley's Justiciary Reports*, 1 *vol.*, 1846–1848.
Arn.	Arnold's Common Pleas Reports, 2 vols., 1838–1839.
A.S. or Act of Sed.	*Act of Sederunt.*
Asp. M.C.	Aspinall's Maritime Law Cases, 7 vols., 1871–1895.
Atk.	Atkyn's Chancery Reports, 3 vols., 1736–1755.
B. & A. or Barn. & Ald.	Barnewall and Alderson's King's Bench Reports, 5 vols., 1817–1822.
B. & Ad. or Barn. & Adol.	Barnewall and Adolphus' King's Bench Reports, 5 vols., 1830–1834.
B. & B.	Broderip and Bingham's Common Pleas Reports, 3 vols., 1819–1822.
B. & C. or Barn. & Cress.	Barnewall and Cresswell's King's Bench Reports, 10 vols., 1822–1830.
B.C.C.	Bail Court Cases, Lowndes and Maxwell, 2 vols., 1850–1851.
B.C.R.	Bail Court Reports, Saunders and Cole, 2 vols. in 1, 1846–1848.
Bac. Abr.	Bacon's Abridgment.
B. & C.R.	Roper's Bankruptcy Cases, 1918 to date.
Balf. Pract.	*Balfour's Practicks*, 1 *vol.*, 1754.
Bankt.	*Lord Bankton's Institute of the Law of Scotland*, 3 *vols.*, 1753.

Barn. C.	Barnardiston's Chancery Reports, 1 vol., 1740–1741.
Barn. K.B.	Barnardiston's King's Bench Reports, 2 vols., 1726–1735.
B. & P.	Bosanquet and Puller's Common Pleas Reports, 5 vols., 1796–1804.
B. & S.	Best and Smith's Queen's Bench Reports, 10 vols., 1860–1870.
Beav.	Beavan's Rolls Court Reports, 36 vols., 1838–1866.
Bell, Arbitration	*Bell (John Montgomerie) on the Law of Arbitration in Scotland, 2nd ed.*, 1877.
Bell, App.	*Bell's House of Lords Cases, 7 vols.*, 1843–1852.
Bell, C.C.	Bell's Crown Cases, 1 vol., 1858–1860.
Bell, Com.	*Bell's (G. J.) Commentaries on the Law of Scotland, 5th ed.*, 1858. *Ordinary references are made to the pages of this edition, which are also given in the 7th edition of same work by M'Laren, 2 vols.*, 1870.
Bell, Convey.	*A. Montgomerie Bell's Lectures on Conveyancing, 3rd ed.*, 1882.
Bell, Law Dict.	*Bell's (William) Dictionary of the Law of Scotland, by Geo. Watson, 1 vol.*, 1890.
Bell, Sale	*Bell's (George Joseph) Inquiries into the Contract of the Sale of Goods*, 1849.
Bell's Notes	*Supplemental Notes to Hume's Criminal Law (ed. 1844), by Benjamin Robert Bell.*
Bell's Fo. Ca.	*Robert Bell's Folio Cases, 1 vol.*, 1794–1795.
Bell's Oct. Ca.	*Robert Bell's 8vo Cases, 1 vol.*, 1790–1792.
Bell's Prin.	*Bell's (George Joseph) Principles of the Law of Scotland, 10th ed., by Guthrie*, 1899.
Bing.	Bingham's Common Pleas Reports, 10 vols., 1822–1834.
Bing. N.C.	Bingham's New Cases, Common Pleas, 6 vols., 1834–1840.
Bitt. P.C.	Bittleston's Practice Cases, 1 vol., 1875–1876.
Bl. H.	Blackstone's (Henry) Reports, 1 vol., 1788–1796.
Bl. W.	Blackstone's (William) King's Bench Reports, 2 vols., 1746–1779.
Blackst. Com.	Blackstone's Commentaries.
Bli.	Bligh's House of Lords Reports, 4 vols., 1819–1821.
Bli. N.S.	Bligh's House of Lords Reports (New Series), 11 vols., 1827–1837.
Books, Sed.	*Books of Sederunt.*
Bos. & Pul.	Bosanquet and Puller's Common Pleas Reports, 5 vols., 1796–1804.
Bos. & P.N.R.	Bosanquet and Puller's New Reports (Common Pleas), 2 vols., 1804–1807.
Brac.	Bracton de Legibus.
Bridg. O.	Bridgman's (Orlando) Reports, 1 vol., 1660–1667.
Bro. Ch. Ca.	Brown's Chancery Reports, 4 vols., 1778–1794.
Bro. & M.	Browne and Macnamara's Railway Cases, 1855 to date.
Bro. P.C.	Brown's Cases in Parliament, 8 vols., 1702–1800.
Bro. Supp.	*Brown's Supplement to Morison's Dictionary of Court of Session Decisions, 5 vols.*, 1622–1794.

Bro. Syn.	*Brown's Synopsis of Decisions, Court of Session.*
Brod. & B.	Broderip and Bingham's Common Pleas Reports, 3 vols., 1819–1822.
Broun	*Broun's Justiciary Reports*, 2 *vols.*, 1842–1845.
Brown. and Lush.	Browning and Lushington's Reports, 1 vol., 1864–1865.
Bruce	*Bruce's Reports, Court of Session*, 1 *vol.*, 1714–1715.
Buck	Buck's Cases in Bankruptcy, 1 vol., 1816–1820.
Burnett	*Burnett's Criminal Law of Scotland*, 1 *vol.*, 1811.
Burr.	Burrow's King's Bench Reports, 5 vols., 1757–1771.
B.W.C.C.	Butterworth's Workmen's Compensation Cases, 1907 to date.
Bynk.	Bynkershoek's Quæstiones Juris Publici, 1 vol., 1737.
C. or Codex	Justiniani Codicis libri duodecim; in Corpus Juris Civilis. [The fragment precedes, the book and title (within brackets) succeed, the initial.]
C.A.	Court of Appeal.
C.A.S.	*Codifying Act of Sederunt*, 1913.
C.B.	Common Bench Reports, or Manning, Granger, and Scott's Reports, 18 vols., 1845–1856.
C.B., N.S.	Common Bench Reports (New Series), 20 vols., 1856–1865.
C.C.C.	*County Council Cases*, 1894 *to date.*
C.C. Ct. Cas.	Central Criminal Court Cases.
C.C.R.	Law Reports, Crown Cases Reserved, 2 vols., 1865–1875.
C. Feud.	Consuetudines Feudorum (printed at the end of the Corpus Juris Civilis).
C.L.R.	Common Law Reports, 3 vols., 1853–1855.
C. & J. or Cromp. & J.	Crompton and Jervis' Exchequer Reports, 2 vols., 1830–1832.
C. & M. or Cromp. & M.	Crompton and Meeson's Exchequer Reports, 2 vols., 1832–1834.
C.M. & R. or Cromp. M. & R.	Crompton, Meeson, and Roscoe's Exchequer Reports, 2 vols., 1834–1836.
C. & R.	Clifford and Rickards' *Locus Standi* Reports, 3 vols., 1873–1884.
C. & S.	Clifford and Stephens' *Locus Standi* Reports, 2 vols., 1867–1872.
C.P.D.	Law Reports, Common Pleas Division, 5 vols., 1875–1880.
C.P.	Common Pleas.
Cab. & El.	Cababé and Ellis' Reports, 1 vol., 1882–1885.
Camp.	Campbell's Nisi Prius Reports, 4 vols., 1808–1816.
C. & K. or Car. & Kir.	Carrington and Kirwan's Nisi Prius Reports, 3 vols., 1843–1850.
Car. & M.	Carrington and Marshman's Nisi Prius Reports, 1 vol., 1840–1842.
C. & P. or Car. & P.	Carrington and Payne's Nisi Prius Reports, 9 vols., 1823–1841.

Carp. P.C. . . . Carpmael's Patent Cases, 2 vols., 1602–1842.
Carth. . . . . Carthew's King's Bench Reports, 1 vol., 1686–1701.
Cas. Pra. C.P. . . Cases of Practice, Common Pleas, 1 vol., 1655–1775.
Ch. (preceded by date) . Law Reports, Chancery, since 1891.
Ch. Ca. . . . Cases in Chancery, 1660 1688.
Ch. D. . . . . Law Reports, Chancery Division, 45 vols., 1875–1890.
Chit. . . . . Chitty's Reports, 2 vols., 1819–1820.
Cl. & Fin. . . . Clark and Finnelly's House of Lords Reports, 12 vols., 1831–1846.
Clerk & Scrope . . *History of the Exchequer.*
Cliff. & Rick. . . Clifford and Rickard's *Locus Standi* Reports, 3 vols., 1873–1884.
Cliff. & Steph. . . Clifford and Stephen's *Locus Standi* Reports, 2 vols., 1867-1872.
Cod. or Cod. Jur. Civ. . Codex (Juris Civilis), Justinian Codex.
Co. & Mun. Rec. . . *County and Municipal Record.*
Co. Lit. . . . Coke on Littleton (1 Inst.).
Co. M.C. . . . Coke's Magna Charta (2 Inst.).
Co. Rep. . . . Coke's King's Bench Reports, 6 vols., 1572–1616.
Co. on Courts . . Coke's Fourth Institute.
Co. P.C. . . . Coke's Pleas of the Crown (3 Inst.).
Coke . . . . Coke's Institutes of the Law of England, 1817.
Coll. C.R. . . . Collyer's Chancery Reports, 2 vols., 1844–1846.
Coll. Jurid. . . . Collectanea Juridica.
Colt. . . . . Coltman's Registration Cases, 1 vol., 1879–1885.
Com. . . . . Comyn's Reports, 2 vols., 1695–1741.
Com. Cas. . . . Commercial Cases, 1895 to date.
Com. Law Rep. . . Common Law Reports, 1853–1855.
Coop. G. . . . Cooper (G.), Chancery Reports, 1 vol., 1815.
Coop. *temp.* Brough. . Cooper (C. P.), Cases *temp.* L. C. Brougham, 1 vol., 1833-1834.
Coop. *temp.* Cott. . . Cooper (C. P.) Cases *temp.* L. C. Cottenham, 2 vols., 1834–1848.
Corb. & D. . . . Corbett and Daniell's Cases, 1 vol., 1819.
Coup. . . . . *Couper's Justiciary Reports*, 5 *vols.*, 1868–1885.
Cowp. . . . . Cowper's King's Bench Reports, 1 vol., 1774–1778.
Cox, Cr. Ca. . . . Cox's Criminal Cases, 9 vols., 1843–1864.
Craig . . . . Craig, Jus Feudale.
Cr. & Ph. . . . Craig and Phillips' Chancery Reports, 1 vol., 1841.
Cr. & St. . . . *Craigie and Stewart's House of Lords Reports*, 1 *vol.*, 1726-1757.
Cr. St. & P. . . . *Craigie, Stewart, and Paton's House of Lords Reports*, 6 *vols.*, 1726–1821.
Cunn. . . . . Cunningham's King's Bench Reports, 1 vol., 1734–1736.
Curt. . . . . Curteis' Ecclesiastical Reports, 3 vols., 1834–1844.

D. . . . . *Dunlop's Series of the Court of Session Reports* (*the Second Series*), 24 *vols.*, 1838–1862.

D. (followed by a bracket) or Dig.	Justiniani Digestorum seu pandectarum libri quinquaguinta; in Corpus Juris Civilis. [The fragment precedes, the book and title succeed, the initial.]
D. & Mer.	Davison and Merivale's Reports, King's Bench, 1 vol., 1843-1844.
D. (H.L.)	*Dunlop's Reports (House of Lords part), vols. 17 to 24*, 1854–1862.
D. & L.	Dowling and Lowndes' Practice Cases, 7 vols., 1846–1849.
D. & Ry.	Dowling and Ryland's King's Bench Reports, 9 vols., 1821–1829.
Dallas, Styles	*Dallas' Styles of Writs, 2nd ed.*
Dalr.	*Dalrymple's Decisions, Court of Session, 1 vol.*, 1698–1718.
Dan.	Daniell's Exchequer Reports, 1 vol., 1817–1819.
Dan. & Ll.	Danson and Lloyd's Mercantile Cases, 1 vol., 1828–1829.
Day, El. Ca.	Day's Election Cases.
Deac. & Ch.	Deacon and Chitty's Bankruptcy Reports, 4 vols., 1832–1835.
De G.	De Gex's Bankruptcy Reports, 1 vol., 1845–1848.
De G. F. & J.	De Gex, Fisher, and Jones' Chancery Appeal Reports, 4 vols., 1860–1862.
De G. & J.	De Gex and Jones' Chancery Appeal Reports, 4 vols., 1857–1860.
De G. J. & S.	De Gex, Jones, and Smith's Chancery Appeal Reports, 4 vols., 1862–1866.
De G. M. & G.	De Gex, Macnaghten, and Gordon's Chancery Appeal Reports, 8 vols., 1851–1857.
De G. M. & G. Bank.	De Gex, Macnaghten, and Gordon's Bankruptcy Cases, 1851–1857.
De G. & Sm.	De Gex and Smale's Chancery Reports, 5 vols., 1846–1852.
Dea. & Sw.	Deane and Swabey's Ecclesiastical Reports, 1 vol., 1855–1857.
Deas & And.	*Deas and Anderson's Reports*, 5 vols., 1829–1833.
Dirleton	*Dirleton's Decisions, Court of Session, 1 vol.*, 1665–1677.
Dirleton's Doubts	*Dirleton's Doubts and Questions in the Law, especially of Scotland, folio*, 1698.
Dod.	Dodson's Admiralty Reports, 2 vols., 1811–1822.
Doug. Q.B.	Douglas' Queen's Bench Reports, 4 vols., 1778–1784.
Dow	Dow's House of Lords Reports, 6 vols., 1812–1818.
Dow & Cl.	Dow and Clark's House of Lords Cases, 2 vols., 1827–1832.
Dow. & Ry. M.C.	Dowling and Ryland's Magistrates' Cases, 4 vols., 1822–1827.
Dow. & Ry. N.P.	Dowling and Ryland's Nisi Prius Cases, 1 vol., 1822–1823.
Dowl. P.R.	Dowling's Queen's Bench Practice Reports, 11 vols., 1830–1842.
Drew.	Drewry's Vice-Chancellor's Court Reports, 4 vols., 1852–1859.

Drew. & Sm.	Drewry and Smale's Vice-Chancellor's Court Reports, 2 vols., 1860–1865.
Duff	*Duff on Feudal Conveyancing*, 1 *vol.*, 1838; *Supplement*, 1 *vol.*, 1848.
Durn. & E.	Durnford and East, or Term Reports (King's Bench), 8 vols., 1785–1800.
Durie	*Durie's Reports, Court of Session*, 1 *vol.*, 1621–1642.
E. & A.	Ecclesiastical and Admiralty Reports, 7 vols., 1841–1850.
East	East's King's Bench Reports, 16 vols., 1801–1812.
Eden	Eden's Reports, 2 vols, 1757–1767.
Edg.	*Edgar's Reports, Court of Session*, 1 *vol.*, 1724–1725.
Edw.	Edward's Admiralty Reports, 1 vol., 1808–1810.
El. & Bl.	Ellis and Blackburn's Queen's Bench Reports, 8 vols., 1852–1858.
El. B. & E.	Ellis, Blackburn, and Ellis' Queen's Bench Reports, 1 vol., 1858.
El. & E.	Ellis and Ellis' Queen's Bench Reports, 3 vols., 1858–1861.
Elch. or Elchies	*Lord Elchies' Court of Session Decisions* (*and in vol.* 24 *of Morison's Dictionary*).
Elch. Annot.	*Elchies' Annotations on Stair's Institutes*, 1 *vol.*, 1824.
Eq. Ab.	Equity Cases Abridged.
Eq. Rep.	Equity Reports, 3 vols., 1853–1855.
Ersk. or Ersk. Inst. (*followed by figures denoting book, title and section respectively*)	*Erskine's Institute of the Law of Scotland, by J. B. Nicolson*, 2 *vols.*, 1871.
Esp.	Espinasse's Nisi Prius Reports, 6 vols., 1793–1807.
Ex.	Welsby, Hurlstone, and Gordon's Exchequer Reports, 11 vols., 1847–1856.
Ex. Div.	Law Reports (New Series), Exchequer Division, 1876–1880.
F.	*Fraser's Series of the Court of Session Reports* (*The Fifth Series*), 8 *vols.*, 1898–1906.
F.B.C.	Fonblanque's Bankruptcy Reports, 1 vol., 1849–1852.
F.C.	*Faculty Collection of Court of Session Cases*, 38 *vols.*, 1752–1841.
F. & F.	Foster and Finlason's Nisi Prius Reports, 4 vols., 1858–1867.
Falconer	*Falconer's Reports, Court of Session*, 2 *vols.*, 1744–1751.
Ferg.	*Ferguson's Consistory Reports*, 1 *vol.*, 1811–1817.
Fitz-G.	Fitz-Gibbon's Reports, 1 vol., 1728–1733.
For.	Forrest's Exchequer Reports, 1800–1801.
Forbes	*Forbes' Decisions, Court of Session*, 1 *vol.*, 1705–1713.
Fortes	Fortesque's Reports, 1 vol., 1743–1761.
Fost.	Foster's Reports, Crown Cases, 1 vol., 1743–1761.
Fount.	*Fountainhall's Decisions, Court of Session*, 2 *vols.*, 1678–1712.

Fox	Fox's Registration Cases, 1 vol., 1886–1895.
Fraser, H. & W.	*Fraser on Husband and Wife according to the Law of Scotland, 2nd ed.*
Fraser, M. & S.	*Fraser on Master and Servant according to the Law of Scotland, 3rd ed.*
Fraser, P. & C.	*Fraser on the Law relative to Parent and Child, Guardian and Ward, 3rd ed., by J. Clark,* 1906.
G. & D.	Gale and Davison's Queen's Bench Reports, 3 vols., 1841–1843.
G. & J.	Glyn and Jameson's Bankruptcy Reports, 2 vols., 1821–1828.
G.O.	General Orders under the Private Legislation Procedure (Scotland) Act, 1899.
Gaii	Gaii Institutionum Commentarii IV.
Gif.	Giffard's Vice-Chancellor's Court Reports, 5 vols., 1857–1865.
Gilb.	Gilbert's Cases in Law and Equity, 1 vol., 1713–1715.
Gilb., C.P.	Gilbert's Common Pleas.
Gilb., R.	Gilbert's Reports, Chancery, 1 vol., 1705–1727.
Gilmour	*Gilmour and Falconer's Reports, Court of Session, 2 vols.* in 1, 1661–1686.
Glanv.	Glanville de Legibus.
Gow	Gow's Nisi Prius Cases, 1 vol., 1818–1820.
Gro. de J. B.	Grotius de Jure Belli.
Guthrie, Sel. Cas. or S.C.	*Guthrie, Select Sheriff Court Cases* (2 *series*), 1879 and 1894.
H. Bl. or Hy Bl.	Henry Blackstone's Common Pleas Reports, 2 vols., 1785–1796.
H. & C.	Hurlstone and Coltman's Exchequer Reports, 4 vols., 1862–1865.
H.C.S.O.	House of Commons Standing Orders.
H. & G.	Hurlstone and Gordon's Exchequer Reports, 2 vols., 1854–1856.
H. & N.	Hurlstone and Norman's Exchequer Reports, 7 vols., 1856–1861.
H.L.C.	Clark's House of Lords Reports, 12 vols., 1847–1866.
H.L.S.O.	House of Lords Standing Orders.
H.P.C.	Hale's Pleas of the Crown, 2 vols.
H. & Tw.	Hall and Twells' Chancery Reports, 2 vols., 1848–1850.
Hag. Adm.	Haggard's Admiralty Reports, 3 vols., 1822–1837.
Hag. Con.	Haggard's Consistorial Reports, 2 vols., 1789–1821.
Hag. Ec.	Haggard's Ecclesiastical Reports, 4 vols., 1827–1833.
Hailes	*Hailes' (Sir David Dalrymple) Court of Session Decisions, 2 vols.*, 1776–1791.
H.B.R.	Hansell's Bankruptcy Reports, 3 vols., 1915–1917.
Hale, C.L.	Hale's Common Law.
Harcarse	*Harcarse's Decisions, Court of Session, 1 vol.*, 1681–1691.
Hare	Hare's Vice-Chancellor's Court Reports, 11 vols., 1841–1853.

Har. & Ruth.	Harrison and Rutherfurd's Reports, 1 vol., 1866–1868.
Har. & W.	Harrison and Wollaston's King's Bench Reports, 2 vols., 1835–1836.
Hein.	Heineccius.
Hem. & M.	Hemming and Miller's Chancery Reports, 2 vols., 1862–1865.
Hodg.	Hodge's Common Pleas Reports, 3 vols., 1835–1837.
Holt N.P.	Holt's Nisi Prius Reports, 1 vol., 1815–1817.
Home (Clk.)	*Clerk Home's Reports, Court of Session*, 1 *vol.*, 1735–1744.
Hop. & Colt.	Hopwood and Coltman's Registration Reports, 2 vols., 1868–1878.
Hop. & Ph.	Hopwood and Philbrick's Registration Reports, 1 vol., 1863–1867.
Hope, Min. Pract.	*Hope's Minor Practicks, Spottiswood's ed.*, 1734.
Horn & H.	Horn and Hurlstone's Exchequer Reports, 2 vols., 1838–1839.
How. St. Tr.	Howell's State Trials, 33 vols., 1809–1826.
Hume	*Baron Hume's Court of Session Decisions*, 1 *vol.*, 1781–1822.
Hume, Com.	*Baron Hume's Commentaries on the Law of Scotland respecting Crimes, 3rd ed., Bell's ed., with Supplemental Notes*, 1829.
Hunt's A.C.	Hunt's Annuity Cases, 1 vol., 1776–1796.
I. or Inst.	Institutes of Justinian. [The fragment precedes, the book and title follow, the initial.]
Ir. C.L.R.	Irish Common Law Reports, 17 vols., 1849–1866.
Ir. Ch. R.	Irish Chancery Reports, 17 vols., 1850–1866.
Ir. Eq. R.	Irish Equity Reports, 13 vols., 1838–1850.
Ir. L.R.	Irish Law Reports, 13 vols., 1838–1850.
Ir. L.T.	Irish Law Times.
I.R.	Irish Reports (Current Series).
I.R. C.L.	Irish Reports, Common Law, 11 vols., 1866–1877.
I.R. Eq.	Irish Reports, Equity, 11 vols., 1866–1877.
Irv.	*Irvine's Justiciary Reports*, 5 *vols.*, 1852–1867.
J.C.	*Justiciary Cases*, 1 *vol.*, 1916–1920.
J.P.	Justice of the Peace Reports, 1857 to date.
J. Shaw	*John Shaw's Justiciary Reports*, 1 *vol.*, 1848–1852.
J. & W. or Jac. & W.	Jacob and Walker's Chancery Reports, 2 vols., 1819–1821.
Jac.	Jacob's Chancery Reports, 1 vol., 1821–1822.
John.	Johnson's Vice-Chancellor's Court Reports, 1 vol., 1859.
John. & H.	Johnson and Hemming's Vice-Chancellor's Court Reports, 2 vols., 1860–1862.
Journ. of Juris.	*Journal of Jurisprudence*, 35 *vols.*, 1857–1891.
Jur.	Jurist Reports, 18 vols., 1837–1854.
Jur. N.S.	Jurist (New Series), 12 vols., 1855–1867.
Jurid. Rev.	*Juridical Review*, 1887 *to date.*
Jur. Styles	*Juridical Styles: Juridical Society's System of Conveyancing*, 1907–1908.
Just. Inst.	Justinian's Institutes.

K.B. (preceded by year)	Law Reports, King's Bench, since 1891.
K. & G.	Keane and Grant's Registration Cases, 1 vol., 1854–1862.
Kames, Eluc.	*Kames' Elucidations respecting the Law of Scotland*, 1 *vol.*, 1777.
Kames, H.L.T. or H.L. Tracts	*Kames' Historical Law Tracts*, 1 *vol.*, 1761.
Kames' Equity	*Kames' Principles of Equity*, 3*rd ed.*, 1778.
Kames	*Kames' Decisions.*
Kames' Rem. D.	*Kames' Remarkable Decisions*, 2 *vols.*, 1716–1752.
Kames' S.D.	*Kames' Select Decisions*, 1 *vol.*, 1752–1768.
Kay	Kay's Vice-Chancellor's Court Reports, 1 vol., 1853–1854.
Kay & J.	Kay and Johnson's Vice-Chancellor's Court Reports, 4 vols., 1854–1858.
Keen	Keen's Reports, Rolls Court, 2 vols., 1836–1838.
Kent, Com.	Kent's Commentaries on the Law of United States.
Kilk.	*Kilkerran's Decisions, Court of Session*, 1 *vol.*, 1738–1752.
Kn.	Knapp's Privy Council Reports, 3 vols., 1829–1836.
L.G.R.	Local Government Reports, 1903 to date.
L.R. A. & E.	Law Reports, Admiralty and Ecclesiastical, 4 vols., 1865–1875.
L.R. C.C.R.	Law Reports, Crown Cases Reserved, 2 vols., 1865–1875.
L.R. Ch.	Law Reports, Chancery Appeals, 10 vols., 1865–1875.
L.R. C.P.	Law Reports, Common Pleas, 10 vols., 1865–1875.
L.R. Eq.	Law Reports, Equity, 20 vols., 1865–1875.
L.R. Exch.	Law Reports, Exchequer, 10 vols., 1865–1875.
L.R. H.L.	Law Reports, House of Lords, English and Irish Appeals, 7 vols., 1866–1875.
L.R. Ir.	Law Reports, Ireland.
L.R. P.C.	Law Reports, Privy Council, 6 vols., 1865–1875.
L.R. P. & D.	Law Reports, Probate and Divorce, 3 vols., 1865–1875.
L.R. Q.B.	Law Reports, Queen's Bench, 10 vols., 1865–1875.
L.R. Sc. & Div.	Law Reports, Scottish and Divorce Appeals, 2 vols., 1865–1875.
L.J.	Law Journal.
L.J. Ad.	Law Journal, Admiralty.
L.J. Ch.	Law Journal, Chancery.
L.J. Eq.	Law Journal, Equity.
L.J. Ex.	Law Journal, Exchequer.
L.J. M.C.	Law Journal, Magistrates' Cases.
L.J. N.C.	Law Journal, Notes of Cases.
L.J. P.C.	Law Journal, Privy Council.
L.J. P.D.	Law Journal, Probate, Divorce, and Admiralty Division.
L.J. Q.B. or K.B.	Law Journal, Queen's Bench or King's Bench Division.
L.J., N.S.	Law Journal (New Series).
L. Mag.	The Law Magazine.
L.Q.R.	Law Quarterly Review.

L.T. . . . . Law Times.
L.T.J. . . . . Law Times Journal.
L.T., N.S. . . . Law Times (New Series).
L. & Welsb. . . . Lloyd and Welsby's Commercial Reports, 1 vol., 1829–1830.
Ld. Raym. . . . Lord Raymond's King's Bench Reports, 3 vols., 1694–1732.
Leg. Burg. . . . *Leges et Consuetudines Quatuor Burgorum in Regiam Majestatem.*
Lee *temp.* H. . . Lee's Cases, *temp.* Hardwicke, King's Bench, 1 vol., 1733–1738.
L. Malc. . . . *Leges Malcolmi, in Regiam Majestatem.*
Le. & Ca. . . . Leigh and Cave's Reports, Crown Cases, 1 vol., 1861–1865.
Lew. C.C. . . . Lewin's Crown Cases, 9 vols., 1822–1838.
Lush. . . . Lushington's Admiralty Reports, 1 vol., 1860–1863.
Lut. R.C. . . . Lutwyche's Registration Cases, 2 vols., 1843–1853.

M. . . . . *Macpherson's Series of the Court of Session Reports (The Third Series)*, 11 *vols.*, 1862–1873.
M. (*preceded by date and followed by number*) . *Morison's Dictionary of Decisions*, 1540–1808.
M. D. & D. . . . Montagu, Deacon, and De Gex's Bankruptcy Reports, 3 vols., 1840–1844.
M. (*H.L.*) . . . *Macpherson's Reports, House of Lords part.*
M. & P. . . . Moore and Payne's Common Pleas Reports, 5 vols., 1828–1831.
M. & R. . . . Manning & Ryland's King's Bench Reports, 5 vols., 1827–1830.
M. & S. . . . Maule and Selwyn's King's Bench Reports, 6 vols., 1813–1817.
M. & W. . . . Meeson and Welsby's Exchequer Reports, 12 vols., 1836–1847.
M'Cle. . . . . M'Cleland's Exchequer Reports, 1 vol., 1824.
M'Cle. & Yo. . . M'Cleland and Young's Exchequer Reports, 1 vol., 1825.
MacFarlane . . . *MacFarlane's Reports, Jury Court*, 1 *vol.*, 1838–1839.
Mac. & G. . . . Macnaghten and Gordon's Chancery Reports, 3 vols., 1849–1851.
Macdonald . . . *Macdonald's Criminal Law of Scotland*, 3*rd ed.*
Mackay, Pract. . . *Mackay's Practice of the Court of Session*, 2 *vols.*, 1879.
Mackay, Manual . . *Mackay's Manual of Practice of the Court of Session*, 1 *vol.*, 1893.
Mackenzie . . . *Sir Geo. Mackenzie's Institutions of the Law of Scotland*, 7*th ed.*, 1730.
M'Laren, A.S. . . *Collection of Public General Statutes and Acts of Sederunt down to* 1861.
M'Laren, Wills . . *M'Laren, Lord, on Wills and Succession*, 2 *vols.*, 3*rd ed.*
M'Laur. . . *M'Laurin's Justiciary Cases*, 1 *vol.*, 1774.
Macl. & R. . . . *Maclean and Robinson's House of Lords Appeals*, 1 *vol.*, 1839.
Macq. . . . . *Macqueen's House of Lords Appeal Cases*, 4 *vols.*, 1851–1865.

Macr.	Macrory's Patent Cases, 1 vol., 1841–1856.
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Menzies	*Menzies on Conveyancing, ed. by Sturrock*, 1900.
Mer.	Merivale's Chancery Reports, 3 vols., 1815–1817.
Mod. Rep.	Modern Reports in King's Bench, 12 vols., 1669–1732.
Mont.	Montagu's Bankruptcy Reports, 1 vol., 1830–1832.
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More's Notes	*More's Notes to Edition of Stair's Institutes of the Law of Scotland.*
Mor.	*Morison's Dictionary of Decisions*, 1540–1808.
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Mun. L.R.	*Municipal Law Reports, 3 vols.*, 1903–1913.
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n.r.	Not reported.
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N. & P.	Neville and Perry's King's Bench Reports, 3 vols., 1836–1838.
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Nov.	Novels (Justinian's) in Corpus Juris Civilis.
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P.D.	Law Reports, Probate Division, 15 vols., 1875–1890.
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P.O.	Provisional Order.
P.P.	Parliamentary Papers.
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Paterson	*Paterson's House of Lords Appeals*, 1851–1873.
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Peake	Peake's Nisi Prius Reports, 2 vols., 1790–1812.
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Parl. Deb.	Parliamentary Debates, Hansard.
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P.L.R.	*Private Legislation Reports.*
Pothier Tr. des Oblig.	Pothier, Traité des Obligations.
Pow. R. & D.	Power, Rodwell, and Dew's Election Cases, 2 vols., 1847–1856.
Price or Pr.	Price's Exchequer Reports, 13 vols., 1814–1824.
Q.B.	Adolphus and Ellis, Queen's Bench Reports, New Series, 18 vols., 1841–1852.
Q.B.	Law Reports, Queen's Bench, since 1891.
Q.B.D.	Law Reports, Queen's Bench Division, 25 vols., 1875–1890.
R.	*Rettie's Series of the Court of Session Reports* (*The Fourth Series*), 25 *vols.*, 1873–1898.
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R. (*J.C.*)	*Rettie's Reports, Justiciary Court Cases*, 1873–1898.
R.S.C.	Rules of the Supreme Courts.
R. & C.T. Ca.	Railway and Canal Traffic Cases, 1855 to date.
R.P.C.	(Patent Office) Reports of Patent Cases, 1884 to date.
R.R.	Revised Reports.
Rail. C.	Railway Cases, 7 vols., 1835–1851.

Reg. Maj.	*Regiam Majestatem.*
Rep. Ch.	Reports in Chancery, 1 vol., 1625–1710.
Rep. Eq.	Gilbert's Reports in Equity, 1 vol., 1713–1715.
Rob. Ap.	*Robinson's House of Lords Reports*, 1 *vol.*, 1707–1727.
Rob. Ad.	C. Robinson's Admiralty Reports, 6 vols., 1798–1858.
Rob. E.	Robertson's Ecclesiastical Reports, 2 vols., 1844–1853.
Robert.	*Robertson's House of Lords Appeal Cases*, 1 *vol.*, 1707–1727.
Rose	Rose's Bankruptcy Reports, 2 vols., 1810–1816.
Ross, L.C.L.R.	*Ross'* (*George*) *Leading Cases in the Law of Scotland* (*Land Rights*), 3 *vols.*
Ross, L.C.M.L.	*Ross' Leading Cases in Mercantile Law*, 3 *vols.*
Ross, Lect.	*Ross'* (*Walter*) *Lectures on the Law of Scotland.*
Rul. Cas.	Campbell's Ruling Cases, 27 vols.
Russ.	Russell's Chancery Reports, 3 vols., 1826–1829.
Russ. & M.	Russell and Mylne's Chancery Reports, 2 vols., 1829–1831.
Russ. & R.	Russell and Ryan's Crown Cases, 1 vol., 1799–1823.
R. & M.	Rickards and Michael, *Locus Standi* Reports, 1 vol., 1885–1889.
R. & S.	Rickards and Saunders, *Locus Standi* Reports, 1 vol., 1890–1894.
Rly. & C. Traf. Cas.	Railway and Canal Traffic Cases, 1885 to date.
Ry. & M.	Ryan and Moody's Nisi Prius Reports, 1 vol., 1823–1826.
S.	*Shaw's Series of the Court of Session Reports* (*The First Series*), 16 *vols. There are two editions of the first* 5 *vols., to the first of which the references are usually* (*but not invariably*) *made*, 1822–1838.
S. & A.	Saunders and Austin, *Locus Standi* Reports, 2 vols., 1895–1904.
S. & B.	Saunders and Bidder, *Locus Standi* Reports, 1904 to date.
S.C. (*preceded by year*)	*Court of Session Cases, since* 1906.
S.C.C.	Select Chancery Cases, 1 vol., 1724–1734.
S.N.	*Session Notes.*
S. & S.	Searle and Smith's Probate and Divorce Reports, 1 vol., 1859–1860.
Salk.	Salkeld's King's Bench Reports, 3 vols., 1689–1712.
Sc. Jur.	*Scottish Jurist*, 46 *vols.*, 1829–1873.
Sc. Rev. Rep.	*Scots Revised Reports.*
S.L.C.R.	*Scottish Land Court Reports*, 1913 *to date.*
S.L.R.	*Scottish Law Reporter*, 1860–1924.
S.L. Rev.	*Scottish Law Review and Sheriff Court Reports*, 1885 *to date.*
S.L.T.	*Scots Law Times Reports*, 1893 *to date.*
Scots Dig.	*Scots Digest of Cases Reported.*
Scott or Sco.	Scott's Common Pleas Reports, 8 vols., 1834–1840.
Sco. N.R.	Scott's New Common Pleas Reports, 8 vols., 1840–1845.
Seton	*Seton's Practice of Heraldry.*
Sh. App.	*Shaw's House of Lords Appeal Cases*, 2 *vols.*, 1821–1824.

Sh. & M'L.	*Shaw and Maclean's House of Lords Appeal Cases*, 3 *vols.*, 1835–1838.
Shand Pr.	*Shand's Practice of the Court of Session.*
Shaw	*Patrick Shaw's Justiciary Reports*, 1 *vol.*, 1819–1831.
Shaw Teind Ca.	*Shaw's Teind Cases*, 1 *vol.*, 1821–1831.
Sim.	Simon's Vice-Chancellor's Court Reports, 19 vols., 1826–1852.
Sim. & St.	Simon and Stuart's Vice-Chancellor's Court Reports, 1822–1826.
Skene	*Skene, De verborum Significatione.*
Skin.	Skinner's King's Bench Reports, 1 vol., 1681–1698.
Sm. & G.	Smale and Giffard's Vice-Chancellor's Court Reports, 3 vols., 1852-1857.
Smeth. App.	Smethurst: Appendix to Treatise on the *Locus Standi* of Petitioners against Private Bills (1867).
Sm. L.C.	Smith's Leading Cases.
Smith	Smith's King's Bench Reports, 3 vols., 1803–1806.
S.O. (H.C.), (H.L.)	Standing Orders of the Lords and Commons relative to Private Bills.
Sol. J.	Solicitors' Journal.
Spotisw. Pract.	*Sir Robert Spotiswood's Practicks of the Law of Scotland*, 1706.
Stair	*Stair's Institutions of the Law of Scotland, More's edition*, 1832.
Stair Rep.	*Stair's Reports, Court of Session*, 2 *vols.*, 1661–1681.
Stark.	Starkie's Nisi Prius Reports, 3 vols., 1815–1822.
S.R. & O.	Statutory Rules and Orders.
Staunf.	Staunforde's Pleas of the Crown.
Steph. Com.	Stephen's Commentaries.
Stra.	Strange's King's Bench Reports, 2 vols., 1716–1749.
Stuart M. & P.	*Stuart, Milne and Peddie's Reports*, 2 *vols.*, 1851–1863.
St. Tri.	State Trials, 34 vols., 1163–1820.
Swa. Ad.	Swabey's Admiralty Reports, 1 vol., 1858–1859.
Sw. & Tr.	Swabey and Tristram's Probate and Divorce Reports, 4 vols., 1858–1865.
Swans.	Swanston's Chancery Reports, 3 vols., 1818–1819.
Swin.	*Swinton's Justiciary Court Reports*, 2 *vols.*, 1835–1841.
Syme	*Syme's Justiciary Court Reports*, 1 *vol.*, 1826–1829.
T.C.	Tax Cases, 1875 to date.
T.L.R.	The Times Law Reports, 1884 to date.
T.R.	Term Reports (Durnford and East), 8 vols., 1785–1800.
Taml.	Tamlyn's Reports, Rolls Court, 1 vol., 1829–1830.
Taun.	Taunton's Common Pleas Reports, 1 vol., 1808–1819.
Thoms. Acts	*Collection by Thomson and Innes of the Scots Acts of Parliament* (*with Index*, 13 *vols.*), 1124–1707.
Thorn.	Thornton's Notes of Cases, 7 vols., 1841–1850.
Tudor Ca. M. L.	Tudor's Leading Cases on Mercantile Law.
Turn. & R.	Turner and Russell's Chancery Reports, 1 vol., 1822–1829.
Tyrw.	Tyrwhitt's Exchequer Reports, 5 vols., 1830–1835.

Tyr. & Gr.	Tyrwhitt and Granger's Exchequer Reports, 1 vol., 1836.
Ulp.	Ulpiani Fragmenta.
Ult.	*In ultimo*, the last fragments in the Corpus Juris Civilis and Consuetudines Feudorum.
V. & B.	Vesey and Beames' Chancery Reports, 3 vols., 1812–1814.
Vatt.	Vattel's Law of Nations.
Vent.	Ventris' King's Bench Reports, 1 vol., 1688–1691.
Vern.	Vernon's Chancery Reports, 2 vols., 1681–1720.
Ves. or Ves. sen.	Vesey's, sen., Chancery Reports, 3 vols., 1747–1756.
Ves. jun.	Vesey's, jun., Chancery Reports, 22 vols., 1789–1816.
Vin. Abr.	Viner's Abridgment.
Vin. Supp.	Viner's Supplement.
Voet	Voet's (John) Commentarii ad Pandectas.
W.N.	Weekly Notes (Law Reports).
W.R.	Weekly Reporter.
W. & S.	*Wilson and Shaw's House of Lords Reports*, 1 *vol.*, 1825–1834.
Web. P.C.	Webster's Patent Cases, 2 vols., 1601–1855.
Wels. H. & G.	Welsby, Hurlstone, and Gordon, Exchequer Reports, 11 vols., 1847–1856.
West.	West's House of Lords Reports, 1 vol., 1839–1841.
White	*White's Justiciary Court Reports*, 3 *vols.*, 1885–1893.
White & Tud.	White and Tudor's Leading Cases in Equity.
Wight Elect.	*Wight's (Alexander) Inquiry into the Rise and Progress of Parliament, chiefly in Scotland.*
Willes	Willes' Common Pleas Reports, 1 vol., 1737–1760.
Will. Woll. & D.	Willmore, Wollaston, and Davison's Reports, 1 vol., 1837.
Will. Woll. & H.	Willmore, Wollaston, and Hodges' Reports, 2 vols., 1838–1839.
Wils. Ch.	Wilson's Chancery Reports, 1 vol., 1818–1819.
Wils. Ex. Eq.	Wilson's Exchequer Reports, 1 part, 1817.
Wight.	Wightwicke's Exchequer Reports, 1 vol., 1810–1811.
Wils.	Wilson's King's Bench Reports, 3 vols., 1742–1744.
Wm. Rob.	William Robinson's Admiralty Reports, 3 vols., 1838–1852.
Wms.	Williams, P., see Peere Williams.
Y. & C.	Younge and Collyer's Exchequer Reports, 4 vols., 1833–1841.
Y. & C.C.C.	Younge and Collyer's Chancery Cases, 2 vols., 1841–1843.
Y. & J.	Younge and Jervis' Exchequer Reports, 3 vols., 1826–1830.
You.	Younge's Exchequer Reports, 1 vol., 1830–1832.

LIST OF CASES CITED.

A. *v.* B. (1875), 293 ; (1899), 165.
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ABANDONING CHILD.

See CHILDREN AND YOUNG PERSONS; CRIME.

ABANDONMENT

OF ACTION. *See* PROCEDURE.
IN BANKRUPTCY. *See* SEQUESTRATION.
IN MARINE INSURANCE. *See* INSURANCE (MARINE).

ABATEMENT

OF INCOME TAX. *See* INCOME TAX.
OF RENT. *See* LEASE.
OF LEGACIES. *See* LEGACY.

ABBREVIATE

OF ADJUDICATION. *See* ADJUDICATION.
OF SEQUESTRATION. *See* SEQUESTRATION.

ABERDEEN ACT.

See ENTAIL.

ABORTION.

See CRIME.

ABSCONDING

OF BANKRUPT. *See* SEQUESTRATION.
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ABSENCE, DECREE IN.

See DECREE; PROCEDURE; SUSPENSION; REDUCTION.

ABSOLUTE DISPOSITION.

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Section 1.—Meaning of Term.

1. The expression "absolute disposition" is usually applied to a disposition of heritable property which conveys the subjects in absolute terms, although the real intention is that the disponee should hold the property subject to some qualification, for example, as trustee for the beneficial use of another, or for the purpose of securing repayment of a debt. The qualification of the right of the disponee is usually expressed in a separate writing known as a back-bond or back-letter, which sets forth the conditions upon which the subjects have been conveyed.[1] Sometimes the conditions are stated in a bilateral Minute of Agreement, and this is probably the more convenient form.[2] The security by absolute disposition, subject to redemption in terms of a back-bond or other form of acknowledgment, is the appropriate form for covering future advances, or for securing obligations in relief.[3] In form and effect it is the modern equivalent of the ancient wadset.[4]

Section 2.—Form.

2. The absolute disposition does not differ in form from an ordinary disposition of heritage, except as regards the consideration mentioned

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General Authorities.—Duff's Feudal Conveyancing, 295; Bell's Commentaries, 7th ed., i. 714–5, 724–6, ii. 218–25, 272–3; Menzies on Conveyancing, 3rd ed., 847–9, 860; Bell's Lectures on Conveyancing, 3rd ed., ii. 1172–5; Bell's Principles, ss. 912, 1367, 1994; Ross's Leading Cases, ii. 721–41; Gloag and Irvine on Rights in Security, 142–165.

[1] Juridical Styles, i. 252.
[2] Burns's Conveyancing Practice, 478.
[3] Bell's Com., 7th ed., i. 724.
[4] Menzies on Conveyancing, 3rd ed., 847–9, 860; Bell's Com. i. 712–3.

in the narrative clause, which in the former deed usually bears to be "for certain onerous causes and considerations." The disponee under the *ex facie* absolute disposition completes title in the ordinary way.

Section 3.—Mode of Proof of Latent Condition.

3. Where a formal back-bond or other acknowledgment is not executed, a question of evidence may arise. The Act 1696, c. 25, enacts "that no action of declarator of trust shall be sustained, as to any deed of trust made for hereafter, except upon a declaration or back-bond of trust lawfully subscribed by the person alleged to be the trustee, and against whom, or his heirs or assignees, the declarator shall be intented or unless the same be referred to oath of party simpliciter." It is settled that as a general rule, and in the absence of specialties, a latent qualification of an *ex facie* absolute disposition can be proved only by writ or oath of the disponee.[1] The presumption is that the deed is what it bears to be.[2]

4. While this is the general rule under the Act of 1696, it should be kept in view that where an absolute disposition is granted for the purpose of securing repayment of advances made by the disponee, the transaction does not strictly fall within the category of trust. The disponee, while he may be bound to account, acquires for himself a beneficial interest in the subjects.[3] In decisions under the Act, generally speaking, the distinction has not been taken between the case of the creditor who has a beneficial interest in the subjects and the trustee properly so called who has none. On the other hand, another principle comes in to exclude parole evidence whenever an attempt is made to qualify the terms of an absolute disposition. According to feudal law the disponee under such a disposition is absolute proprietor, and he may insist on his rights as such unless his written title is modified *habili modo*. Agreements relating to heritage are provable only by writ or oath.[4] Whether, however, the case is one of pure trust,[5] or is one where the transaction is partly for the benefit of the disponee, the general rule may be taken as fixed: the apparently absolute right conferred by the disposition can be cut down only by writ or oath of the disponee.

5. It is not necessary that the writ relied on should be a probative deed.[6] Any writing under the hand of the party is sufficient. The

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[1] *Duggan* v. *Wight*, 1797, Mor. 12761; 3 Pat. App. 610; Duff's Feudal Conveyancing. 295; *Marshall* v. *Lyell*, 1859, 21 D. 514; *Laird & Co.* v. *Laird & Rutherfurd*, 1884, 12 R, 294; *Dunn* v. *Pratt*, 1898, 25 R. 461; Bell's Prin. s. 1995.

[2] *Walker* v. *Buchanan, Kennedy & Co.*, 1857, 20 D. 259, per Lord Ivory at 264.

[3] *National Bank of Scotland, Ltd.* v. *Union Bank of Scotland, Ltd.*, 1885, 13 R. 380, per Lord President Inglis at 413; 1886, 14 R. (H.L.) 1, per Lord Watson at 4.

[4] *Leckie* v. *Leckie*, 1854, 17 D. 77; *Govan New Bowling Green Club* v. *Geddes*, 1898, 25 R. 485.

[5] As was, for example, *Duggan* v. *Wight supra*.

[6] *Taylor* v. *Crawford*, 1833, 12 S. 39; *M'Farlane* v. *Fisher*, 1837, 15 S. 978; *Walker* v. *Buchanan, Kennedy & Co.*, 1857, 20 D. 259; *Marshall* v. *Lyell*, 1859, 21 D. 514; *Paterson* v. *Paterson*, 1897, 25 R. 144, per Lord Kyllachy at 175.

existence of a trust may be established by the tenor of several documents taken together.[1] It would appear to be necessary that the writing should be subscribed,[2] but trust may also be proved by entries in the books of the trustee kept by himself.[3] In this last instance subscription is dispensed with from the nature of the case.[4] If the informal writings, or entries in books, shew that the disponee holds the subjects conditionally, parole will be allowed as to the extent of the obligation. In such a case the terms of the trust may be proved by facts and circumstances.[5] Where a writing founded on as a declaration of trust is ambiguous, it is competent to prove by parole the circumstances in which it was executed and delivered.[6] Trust may also be proved or inferred from admissions made on record, it being a fundamental rule of Scottish pleading that statements of fact made by a party on record are conclusive against him.[7]

6. On the other hand, it is indispensable to the application of the statute that the true owner of the property should have consented to an absolute title being taken in the trustee's name.[8] If, for example, the allegation is that the disponee received a mandate to purchase a property on behalf of the pursuer and to take the title in the pursuer's name, but that in breach of his mandate he took the title in his own name, such a case may be established *pro ut de jure*.[9]

7. Parole evidence is also competent where there is a relevant averment that the constitution of the trust was due to fraud.[10] Fraud in the constitution of the title forms a good ground not for a declarator of trust, but for an action of reduction.[11] The fraud must be such as induces the granting of the deed, as distinct from the fraud which consists in denying the existence of the trust.[12] But an averment that a back-letter at one time existed and that it was destroyed by fraud would be provable by parole.

8. Lastly, the Act applies only to declarators of trust at the instance of the truster, or his representatives, against the trustee or those in his right.[13] Third parties may have an interest in proving the existence

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[1] *Seth* v. *Hain*, 1855, 17 D. 1117.
[2] *Walker, supra*, 20 D. 259, per Lord Deas at 269 ; Bell's Prin., s. 1995.
[3] *Thomson* v. *Lindsay*, 1873, 1 R. 65 ; Dickson on Evidence, s. 585.
[4] M'Laren on Wills and Succession, ii. 1067.
[5] *Stewart* v. *Bannatyne*, 1777, 5 Brown's Sup. 631 ; Hailes, 762 ; *Livingstone v. Allans*, 1900, 3 F. 233 at 237.
[6] *Evans* v. *Craig*, 1871, 9 M. 801.
[7] *Chalmers* v. *Chalmers*, 1845, 7 D. 865 ; Dickson on Evidence, ss. 417, 586.
[8] *Boswell* v. *Selkrig*, 1811, Hume 350 ; *Mackay* v. *Ambrose*, 1829, 7 S. 699 ; *Horne* v. *Morrison*, 1877, 4 R. 977 ; *Pant Mawr Quarry Co.* v. *Fleming*, 1883, 10 R. 457 ; *Dunn* v. *Pratt*, 1898, 25 R. 461.
[9] *Dunn* v. *Pratt, supra*.
[10] *Wink* v. *Speirs*, 1867, 6 M. 77.
[11] *Marshall* v. *Lyell*, 1859, 21 D. 514, at 521.
[12] *Tennent* v. *Tennent's Trs.*, 1868, 6 M. 840, at 876.
[13] *Elibank* v. *Hamilton*, 1827, 6 S. 69 ; *Scott* v. *Miller*, 1832, 11 S. 21.

of a trust for collateral purposes.[1] Accordingly parole evidence is not excluded where a latent trust is averred by a person who was not a party to its constitution, but who has an interest to make good a claim against either truster or trustee.[2] Moreover, the trustee himself, holding an absolute title, may prove by parole that he is not an absolute proprietor.[3]

9. The specialties which will exclude the application of the Act, 1696, c. 25, were thus summarised by the Lord Justice-Clerk (Inglis) in the important case of *Marshall* v. *Lyell*[4]: "Either that the form of proceeding was not a declarator of trust, or that there was no trust deed or conveyance, or that the question did not occur between trustee and truster or persons in their right, or that there was fraud in the original constitution of the title as a title absolute, or fraud in the destruction of the back-bond or declaration of trust. Any one of these specialties is enough to exclude the application of the statute."

Section 4.—Security for Future Advances—Act 1696, c. 5.

10. Absolute disposition, qualified by back-bond, was a form devised on account of the difficulty of heritably securing debts to be incurred in the future, by any form of deed which expressly bore to be a security only. By the common law of Scotland no effectual security could be constituted over lands or other heritable subjects for debts or burdens of indefinite amount.[5] Even when the sum was definite the security could not cover a debt contracted after the sasine or infeftment. This last rule was established by the Statute 1696, c. 5, which enacted "that any disposition or other rights that shall be granted for hereafter for relief or security of debts to be contracted for the future shall be of no force as to any such debts as shall be found to be contracted after the sasine or infeftment following on the said disposition or right, but prejudice to the validity of the said disposition and right as to other points as accords."

11. On a construction of this statute the following points were settled: (1) The Act does not strike at an infeftment in security for sums advanced after the date of the bond, but prior to the date of the sasine.[6] (2) A heritable bond was granted for a definite sum. At the date of execution of the bond only a part of the sum named had been advanced, but the grantee gave an obligation to pay such further sum

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[1] *Hastie* v. *Steel*, 1886, 13 R. 843.

[2] M'Laren on Wills and Succession, ii. 1070.

[3] *Murdoch* v. *Wylie*, 1832, 10 S. 445; Dickson on Evidence, s. 582.

[4] 1859, 21 D. 514.

[5] Bell, Com. ii. 218; *National Bank of Scotland, Ltd.* v. *Union Bank of Scotland, Ltd.*, 1885, 13 R. 380, per Lord President Inglis at 409.

[6] *Pickering* v. *Smith*, 1788, Mor. 1155; *Stein's Creditors* v. *Newham, Everett & Co.*, 1789, Mor. 1158; *Brough's Creditors* v. *Selby's Heirs*, 1791, Mor. 1159.

as would, with the advances already made, make up the full amount mentioned in the bond. This balance was paid by the grantee on receiving a search of incumbrances and in exchange for delivery of the recorded sasine. It was held that the bond was not reducible under the Act as having been granted in security of a future debt.[1] (3) A heritable security granted for sums advanced posterior to the date of the deed, but prior to the delivery of it to the creditor, was found to be valid.[2] (4) A heritable security was granted for a large sum of advance actually made but which was allowed to continue the subject of operations by bills of exchange, the heritable right remaining as a collateral security. As the security was given for a sum advanced at the time, it was held not to be invalidated by the renewal of the bills.[3]

12. It was accordingly established that no debtor could give an infeftment in security over his heritable estate for a future debt. But it was possible to effect this object indirectly by means of an absolute disposition and back-bond. The proprietor could convey his heritage in absolute terms heritably and irredeemably, taking in return a back-bond or back-letter stating the conditions on which he should be entitled to demand a reconveyance. In such a case the title acquired by the disponee was a title of property which could be extinguished only by reconveyance, although by contract it was merely a security. The right remaining in the person of the disponer was a right of redemption under the back-bond, or a power of calling the disponee to account. Such an absolute disposition might be set aside if the granter were insolvent, but it was not affected by the part of the Act 1696, c. 5, which is directed against future debts.[4] The Court sustained this form of security as effectual for debts due by the granter to the grantee.[5] Thus the law was settled that it was competent to secure a cash account for a future advance by no other form of heritable security but an absolute disposition.

13. The expediency of giving facilities for heritably securing cash credit accounts led to a relaxation of the rule laid down by the Act 1696, c. 5. This was effected by the Bankrupt Acts of 1793 [6] and 1814,[7] the terms of which, with some verbal alterations, were repeated in section 7 of the Debts Securities (Scotland) Act, 1856.[8] The provisions of that section are as follows :—

(1) That it shall be lawful for any person possessed of lands or other heritable property, and desiring to pledge the same in security of any

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[1] *Fulton* v. *Lead*, 1826, 4 S. 747.
[2] *Creditors of Dunbar* v. *Abercromby*, 1789, Mor. 1156.
[3] *Bank of Scotland*, 1781, Mor. 14121; 2 Ross's L.C. 671; 1782, 2 Ross's L.C. 679; Bell's Com. ii. 221.
[4] Bell's Com. ii. 223.
[5] *Riddell* v. *Niblie's Creditors*, 1782, Mor. 1154; Ross's L.C. ii. 721.
[6] 33 Geo. III. c. 74, s. 12.
[7] 54 Geo. III. c. 137, s. 14.
[8] 19 & 20 Vict. c. 91.

sums paid or balances arising or which may arise upon cash accounts or credits, or by way of relief to any persons who may become bound with him for the payment of such sums or balances, although paid or arising posterior to the date of the infeftment, to grant heritable securities accordingly upon his lands or other heritable property, containing warrant for infefting any bank or banker or other persons who shall agree to give such cash accounts or credits.

(2) That securities may in the same way be granted "to such persons as shall become cautioners for him, or jointly bound with him in such cash accounts or credits."

(3) It is made a condition that the principal and interest which may become due upon such cash accounts or credits shall be limited to a certain definite sum, to be specified in the security, such definite sum not exceeding the amount of the principal sum, and three years' interest thereon at the rate of 5 per cent.

(4) That it shall be lawful for the person to whom any such cash account or credit is granted to operate upon the same by drawing out and paying in such sums from time to time as the parties may settle between themselves, and that the infeftments taken upon such heritable securities shall be equally valid and effectual as if the whole sums advanced upon such cash account or credit had been paid prior to the date of the infeftment, and that any such heritable security shall remain and subsist to the extent of the sum limited, or any lesser sum, until the cash account or credit is finally closed, the balance paid up and discharged, and the infeftment renounced.

14. In a case where a heritable bond was granted for securing a cash credit, and the bond bore that the whole sum to be recovered should not exceed £5000 and three years' interest thereon at the rate of 5 per cent., it was held that this was a sufficient compliance with the provision of the section as to specifying in the security a certain definite sum.[1]

15. It is well settled that a transaction by way of absolute disposition, qualified by back-bond, is not struck at by the Act 1696, c. 5.[2] Nor are the above-quoted provisions of the Act of 1856 applicable to such a security.[3]

Section 5.—Difference between Absolute Disposition and Heritable Bond.

16. The position of a disponee under an absolute disposition, qualified by back-bond, differs in many important points from that of the holder of an infeftment in security, such as a bond and disposition in security. In the case of an ordinary security the property remains

[1] *Morton* v. *Hunters*, 1828, 7 S. 172; 1830, 4 W. & S. 379.
[2] Bell's Com. ii. 223; *Riddell* v. *Niblie's Creditors*, 1782, Mor. 1154.
[3] *National Bank of Scotland, Ltd.*, *supra*, 13 R. 380, per Lord President Inglis at 409.

with the debtor, and the creditor is a mere encumbrancer whose right is extinguished by discharge, or even without a discharge, simply by payment. A disponee under an absolute disposition acquires, so far as title is concerned, a right of property which cannot be extinguished by discharge, but only by reconveyance.[1] The recording of the disposition—the back-bond being unrecorded—has the effect of vesting the full feudal estate in the disponee. The disponer's interest is reduced to a personal right to have the estate, or its proceeds, reconveyed or paid to him, on payment or under deduction of the secured debts.

17. As regards third parties who transact with him on the faith of the records, the powers of the disponee are not affected by the personal contract expressed in the back-letter. He can sell and burden the estate, and give a good title to the purchaser or encumbrancer, although the creation of these rights should be in violation of the terms of his contract.

18. But while the disponee has by title a right of property, by contract it is a security. In a question with the disponer, or with persons who through him have acquired an interest in the estate or in the personal contract, the disponee is affected by the back-letter, and is treated as the holder of a mere security. In all such cases the rights of parties must be determined, not according to the form of the disponee's title, but according to the substance of the transaction. This was the main ground of the judgment of the House of Lords in the leading case of *National Bank of Scotland, Ltd.* v. *Union Bank of Scotland, Ltd.*[2]

Section 6.—Effect of Bankruptcy of the Disponee.

19. In the event of the disponee becoming bankrupt, a question may arise as to the extent of the interest which passes to his trustee. Earlier authorities had appeared to establish that a trustee in a sequestration took the heritable estate in which the bankrupt was infeft, free from all qualifications and limitations which did not appear upon the record.[3] This view was held to be erroneous in the case of *The Heritable Reversionary Co., Ltd.* v. *Millar*.[4] There the bankrupt was infeft in heritable subjects in which he had no beneficial interest, and which admittedly he held in trust. A declaration of trust had been executed by him but had not been recorded in the Register of Sasines. It was held by the House of Lords, reversing the decision of the Court of Session, that although the bankrupt had an unqualified feudal title, the heritage did not belong to him and therefore did not vest in the

[1] *National Bank of Scotland, Ltd.*, 13 R., per Lord Fraser at 400, Lord President Inglis at 409–10.

[2] 1885, 13 R. 380 ; 1886, 14 R. (H.L.) 1 ; 12 A.C. 53.

[3] *Mansfield* v. *Walker's Trs.*, 1833, 11 S. 813. See also authorities discussed in Lord Kinnear's opinion in *Heritable Reversionary Co., Ltd.* v. *Millar*, 1891, 18 R. 1166.

[4] 1891, 18 R. 1166 ; 1892, 19 R. (H.L.) 43.

trustee. The Act and Warrant of Confirmation had the effect [1] of transferring to the trustee "the whole property of the debtor," but the heritable subjects in question, in which the debtor had no beneficial interest, were not his "property." He could, of course, have given a valid title to creditors transacting with him for value and in good faith. That was not because the property was his, but upon the principle that a true owner who conceals his right from the public, and clothes another with all the *indicia* of ownership, is barred from challenging rights acquired by third parties for onerous considerations.[2] The trustee in the sequestration was not in the same position as such a *bona fide* alience for value. The personal creditors whom he represented had no doubt given the bankrupt credit, but they had not by transaction with him acquired for value an interest in the heritable estate. They had relied merely on the personal credit of the debtor.

20. The decision in *Millar's* case related to a heritable property in which the bankrupt was a bare trustee. Similar considerations would not necessarily apply to the disponee under an *ex facie* absolute disposition who had himself a beneficial interest in the subjects, but was bound to account for the reversion. But the principle of *Millar's* case is that even when the title is unqualified, and stands on the record as such, the creditors of the *ex facie* absolute proprietor can take no higher right than he himself possessed. The rule is applicable to security titles as well as to trusts.[3] On the disponee becoming bankrupt, the trustee in his sequestration would be entitled to retain the property in security of the debt owing to the bankrupt at the date of sequestration. On this debt being satisfied he would be bound, as the bankrupt would have been, to account for the reversionary value to the true owner.

Section 7.—Powers of Disponee.

21. The disponee under an absolute disposition recorded in the Register of Sasines, there being no back-bond recorded, has a right by virtue of his title to exercise all the powers of an absolute owner. Infeftment is the legal mode of taking possession of heritage, and he requires no process of law to enable him to enter into possession. He is entitled to grant leases of the subjects, and to output and input tenants. He has the same right to draw the rents as the disponer to him formerly had.[4] As in a question with the disponer, the right to exercise those powers might be controlled by the terms of the back-letter, even if unrecorded, but subject to any limitations imposed by contract the effect of enabling him to become an infeft proprietor is to arm him with all the rights and remedies of an owner.

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[1] Section 102 of the Bankruptcy Act, 1856, now represented by s. 97 of the Bankruptcy Act, 1913.

[2] Per Lord Watson at 47.

[3] *Forbes's Trs.* v. *Macleod*, 1898, 25 R. 1012.

[4] *Scottish Heritable Security Co.* v. *Allan, Campbell & Co.*, 1876, 3 R. 333.

22. The title conferred upon him is not that of an encumbrancer. He has not the right to avail himself of the remedies of a heritable creditor. For example, he is not entitled to use the remedy of poinding the ground. The foundation of that form of diligence is a *debitum fundi*, and a proprietor cannot be in right of a *debitum fundi* in respect of his own land. He cannot poind his own ground.[1]

23. If the disposition although *ex facie* absolute was truly granted in security of debt, the disponee, while he has a right to terminate the possession of his debtor, is not entitled to do so by a petition for summary ejection. The proper procedure is to raise an action of declarator and removing.[2] To warrant the remedy of summary ejection, it must be shewn either that possession was obtained by fraud or force or that it was precarious, *i.e.* without title. A debtor who has conveyed his heritage subject to reversion may have no right to remain in possession against the will of the disponee, but it cannot be said that his possession was wholly without warrant. On the other hand, under s. 5 of the Heritable Securities (Scotland) Act, 1894,[3] a heritable creditor is entitled to eject a proprietor who is in personal occupation of the land disponed in security. That section does not appear to be applicable to the disponee under an absolute disposition.

24. If the granter of an absolute disposition becomes bankrupt, that cannot affect the legal position of the disponee. Assuming the disposition to have been granted for the purpose of securing payment of a debt, the disponee is entitled to continue to administer the property, and cannot be ousted from possession at the instance of the trustee in the disponer's sequestration until the full amount of the debt owing to him has been satisfied.[4]

Section 8.—The Disponee's Heir at Law succeeds.

25. Under the Titles to Land Consolidation Act, 1868,[5] a heritable security is moveable as regards the succession of the creditor, and it passes on his death to his representatives *in mobilibus*. This rule does not apply to securities by way of absolute dispositions qualified by back-bonds or letters.[6] The succession to such is therefore regulated by the common law. At common law debts secured upon heritage are heritable in character.[7] The heir at law of the disponee would succeed to the right, subject to all the equities which attached to it in the person of his ancestor. If the disposition had been granted in security of a

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[1] *Scottish Heritable Security Co., supra.*

[2] *Scottish Property Investment Company Building Society* v. *Horne*, 1881, 8 R. 737; *Rankin* v. *Russell*, 1868, 7 M. 126.

[3] 57 & 58 Vict. c. 44.

[4] *Lindsay* v. *Davidson*, 1853, 15 D. 583.

[5] 31 & 32 Vict. c. 101, s. 117.

[6] Sec. 3 (10).

[7] Ersk. ii. 2, 5, 14; Bell's Prin., ss. 1478, 1485; cp. *Stroyan* v. *Murray*, 1890, 17 R. 1170.

debt, the claim being heritably secured would pass to the heir at law, but on payment of the debt he would be bound to restore the property, or to account for its proceeds, to the disponer or his representatives.

Section 9.—Prescriptive Possession on Absolute Disposition.

26. Another important distinction between a disposition which expressly bears to be in security only, and one which is in terms absolute, is that the former can never by prescription confer a right in absolute property.[1] On the other hand, if the disposition be *ex facie* absolute and the disponee becomes infeft, the result of possession thereon for the prescriptive period will be to cut off the right of reversion.[2] The disponee in that case, or his successors in title, would be entitled to claim the absolute property. This must be taken subject to the observation that no person can, by possession for any period, acquire by prescription the right to perpetuate a breach of trust.[3] If the disponee is a mere trustee, then so long as the property remains extant in his hands neither the positive nor the negative prescription can be appealed to so as to prevent a beneficiary from vindicating his right. The possession of the trustee is deemed to be the possession of the beneficiary. If the trustee transfers the property to a third party who possesses it upon an *ex facie* absolute title, such party will be held to be in possession for his own behoof, and both positive and negative prescription will begin to run in his favour. So long, however, as the prescriptive period has not expired, a third party who is a gratuitous disponee will hold the property under burden of any latent trust which affected the right of the trustee.[4]

Section 10.—Extent of Security.

27. If the absolute disposition has been granted subject to obligation to reconvey, or to account for the proceeds, the disponee is entitled to hold the subjects until satisfaction has been made of all debts incurred to him by those having the beneficial right to the property. That is the general rule, and it is founded on the principle of retention.[5] If the back-letter or other acknowledgment is general in tenor, the disponee has a right to retain in respect of debts incurred before, as well as in

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[1] *National Bank of Scotland, Ltd., supra*, 13 R. at 400.

[2] Act 1617, c. 12; Ersk. iii. 7, 10; *Scott* v. *Bruce Stewart*, 1799, Ross's L.C. iii. 464; *Munro* v. *Munro*, 19th May 1812, F.C.; *Chalmers* v. *Law*, 1823, 2 S. 326.

[3] *University of Aberdeen* v. *Magistrates of Aberdeen*, 1876, 3 R. 1087; 1877, 4 R. (H.L.) 48.

[4] *University of Aberdeen* v. *Irvine*, 1866, 4 M. 392; 1868, 6 M. (H.L.) 29; *Thain* v. *Thain*, 1891, 18 R. 1196; *Cooper Scott* v. *Gill Scott*, 1924 S.C. 309, per Lord Skerrington at 331.

[5] *Brough's Creditors* v. *Jollie*, 1793, Mor. 2585; *Maitland* v. *Cockerell*, 1827, 6 S. 109; *Russell* v. *Earl of Breadalbane*, 1829, 7 S. 767; *James* v. *Downie*, 1836, 15 S. 12; *Robertson* v. *Duff*, 1840, 2 D. 279; *Nelson* v. *Gordon*, 1874, 1 R. 1093, per Lord Deas at 1100.

respect of debts incurred subsequently to, the date of the disposition. Even if the disposition bears to be granted in security of a specified debt, the disponee may retain for subsequent advances. It is not clear that in such a case he would not be entitled to retain also for a debt, other than that specified in the back-letter, which was owing at the date when the property was acquired.[1] The question would depend upon the precise terms in which the back-letter was expressed. The terms of the back-letter may be such as to shew that the intention was to confine the security to a particular debt to the exclusion of others. That is perhaps an exceptional case, but it is illustrated by the decision of the Court in *Robertson* v. *Duff*,[2] a leading case on this subject. The case contains an exposition by Lord Fullerton [3] as to the extent of the right of the disponee to retain the subjects in security of debt.

28. If the disponee, being infeft, enters into possession of the subjects and expends money on them, he is entitled to be reimbursed to the extent that the real owner is *lucratus* by the expenditure.[4] He would probably also be entitled to relief against liabilities which he might incur by reason of his infeftment. For example, in a question with the superior he might become liable in payment of feu-duties or casualties of superiority.[5] While the disponee would be personally liable to make such payments, they would not constitute his own proper debt. In a question with the rest of the world he is an owner ; in a question with the debtor he is a security holder. Expenses inevitably incurred in holding the subjects would seem to be as good a charge against the debtor as expenses of realising the security. There does not appear, however, to be any express decision, and the point must therefore be regarded as open.

29. The disponee's right of retention does not extend to advances made after the true owner has become bankrupt.[6] This is really an application of the principle established in the *National Bank of Scotland* case. On the debtor's bankruptcy the right of reversion passes to the trustee in the sequestration. The disponee is accordingly not entitled to charge the reversionary interest with the amount of advances made to a person to whom such interest does not belong.

Section 11.—Registration of Back-bond.

30. The result of recording the back-bond in the Register of Sasines is to publish the conditions which qualify the right of the disponee.[7] The judicial production of the back-bond is held to have the same effect

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[1] Per Lord Mackenzie in *Robertson* v. *Duff*, *supra*, 2 D. at 290.
[2] 1840, 2 D. 279.
[3] At pp. 291–2.
[4] *Nelson* v. *Gordon*, 1874, 1 R. 1093.
[5] See *infra*, para. 34.
[6] *Callum* v. *Goldie*, 1885, 12 R. 1137.
[7] *National Bank of Scotland, Ltd.*, *supra*, 13 R. at 390 ; *Edinburgh Entertainments, Ltd.* v. *Stevenson*, 1926, S.L.T. 286.

as registration.[1] It has been laid down by text-writers of authority that after registration of the back-bond, the obligation to denude is made a real limitation of the disponee's right.[2] What this statement means is not entirely clear. The precise effect of registration of the back-bond has not yet been determined by decision of the Court. The important questions to consider are how far such registration, or its equivalent, qualifies the right of the disponee, firstly, to sell, or, secondly, to hold the subjects in security of further advances made to the debtor after the date of registration.

31. Notwithstanding the recording of the back-bond, the title of the disponee remains that of an infeft proprietor. The recorded back-bond, unless its terms be special, does not inform intending purchasers that the disponee is prohibited from exercising the power of sale. It merely intimates that if the debt is repaid before sale the disponee is bound to reconvey; if the subjects are sold before repayment, that the disponee is bound to account for the proceeds. There does not seem to be any reason, therefore, why the disponee should not have the power to sell the lands, with the effect of conferring a good title upon a purchaser.[3] Of course the right to sell would be controlled by any stipulation contained in the back-letter.

32. As regards the right to make further advances in security of the subjects disponed, that again must depend on the language of the back-bond. If the provision were to the effect that the transaction was intended to secure all advances made or to be made, there does not seem anything to hinder the disponee from taking full advantage of his contract and making the subjects available for *all* his advances, both those made after, as well as those made before the date of registration. The publication of the back-bond would do no more than inform the public that no reconveyance could be demanded until all debts due by the granter to the disponee had been paid.[4] If the back-letter were to state that the total advances to be secured were not to exceed a specified sum, third parties would be entitled to rely on that limit not being exceeded. The important point about registration of the back-bond is that third parties are informed of the real contract between disponer and disponee. They are bound by the information so conveyed, just as they would be if they had private knowledge of the real terms of the transaction.[5]

33. The question has been raised[6] whether, the back-bond having been recorded, the use of the absolute disposition thereafter to secure further advances is not struck at by the part of the Act of 1696, c. 5,

[1] *Keith* v. *Maxwell*, 1795, M. 1163; Bell's Folio Cases, 234; Bell's Com. i. 725.

[2] Bell's Prin., s. 912; Menzies on Conveyancing, 3rd ed., 861; Bell's Lectures, ii. 1174.

[3] *Scottish Heritable Security Co.* v. *Allan, Campbell & Co.*, 1876, 3 R. 333, per L.P. Inglis at 340; *Duncan* v. *Mitchell*, 1893, 21 R. 37; but see also dictum by L.P. Inglis in *Dundee Calendering Co.*, 1869, 8 M. 289, at 294.

[4] Per Lord Justice Clerk Moncreiff in *National Bank of Scotland, Ltd., supra*, 13 R. at 391.

[5] *Petrie* v. *Forsyth*, 1874, 2 R. 214; *Stodart* v. *Dalzell*, 1876, 4 R. 236.

[6] Menzies on Conveyancing, 3rd ed., 861.

which prohibits the burdening of heritable subjects with debts contracted after the date of the sasine of the creditor. But it is settled that that statute does not strike at transactions by way of absolute disposition qualified by back-bond.[1] If the back-bond states that the security is to be limited to a specified sum, and if the whole amount has not been advanced prior to registration of the back-bond, further advances may be made on the security of the property within the limit specified.[2]

Section 12.—Liabilities of the Disponee.

34. A creditor who accepts an absolute disposition and records it may find himself exposed to serious liabilities. On account of his infeftment, and consequent entry with the superior, he is liable in performance of all the obligations of the feu. Whatever his right of relief may be, he is responsible in the first instance. Not merely is he liable in payment of feu-duty [3] and casualties of superiority, but he may be compelled to perform obligations *ad facta præstanda*. Thus a company which had obtained and recorded an *ex facie* absolute disposition in security of a debt, and had granted a back-letter which was not recorded, were held liable in a process at the instance of the superior to rebuild a mill which had been totally destroyed by fire. The ground of judgment was that the company, having become feudally vested, were bound to fulfil all the obligations incumbent on the original vassal. The obligation to uphold and, if necessary, to rebuild the mill was held to be one that ran with the lands.[4] Again, a bank which was infeft on an absolute disposition, granted in security of advances, was compelled to pay the feu-duty to the superior, although prior creditors holding a bond and disposition in security had entered into possession and levied the rents. In this case the bank was held entitled to obtain relief from the bondholders who, by intromitting with the rents, had rendered themselves liable in payment of the feu-duty.[5] As already pointed out, the disponee who incurs such liabilities would probably be entitled to relief from the beneficial owner, who is the real debtor in the obligation.[6]

Section 13.—Discharge of Liability of Disponee.

35. On the debt being discharged, the beneficial owner is bound to accept and record a reconveyance.[7] He may be bound to do so, whether or not the debt has been paid in full. The creditor may have obtained payment by realising other securities, and may no longer have any need to hold the subjects. The debtor may have become bankrupt, and the creditor may be unable to find a purchaser. If the

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[1] See *supra*, para. 15.
[2] Bell's Com. ii. 223.
[3] *Liquidators of City of Glasgow Bank* v. *Nicolson's Trs.*, 1882, 9 R. 689.
[4] *Clark* v. *City of Glasgow Life Assurance Co.*, 1850, 12 D. 1047; 1854, 1 Macq. 668.
[5] See note 6, p. 15.
[6] *Supra*, para. 28.
[7] *Clydesdale Bank, Ltd.* v. *M'Intyre*, 1909 S.C. 1405.

debtor refuses to accept a reconveyance, or if the debtor cannot be found, the creditor may be confronted with a difficult problem. What steps are open to him in order to get rid of his liability ? This question has been considered in several decided cases.

36. In *Gardyne* v. *The Royal Bank of Scotland*,[1] the defenders were infeft in a burgage property under an absolute disposition, qualified by a back-bond which was not recorded until several years afterwards. It was held by the Court of Session that the defenders were liable in payment of a ground annual which had been made a real burden on the subjects. The Court were further of opinion that the defenders as entered vassals must remain liable until a new vassal had been received by the superior. Accordingly it was held that it did not avail the defenders that after the action was raised they had recorded the back-letter, and that they had subsequently executed and put on record a discharge and renunciation of the security. This decision was reversed in the House of Lords. It was held that no personal obligation to pay the ground annual arose from the mere tenure of land, although the land remained subject to the burden.[2] The reversal does not seem to affect the rule laid down in the Court of Session that, in the case of an obligation which runs with the land, the proprietor for the time must remain liable until another vassal has been entered with the superior.

37. In another case [3] a person who was infeft under an absolute disposition, which had really been granted in security, was sued for implement of certain obligations alleged to be contained in the title. The Lord Ordinary (Kinnear) held that even if the defenders were to be treated as proprietors the obligations sued on were not enforceable against them at the instance of the pursuer, who was not the superior. His Lordship was of opinion that the defenders fell to be assoilzied on a separate ground, viz. that after the action was raised they had recorded a back-bond, and had executed and recorded a disposition and reconveyance in favour of the debtor, and obtained a decree in absence ordaining him to accept and record it. On a reclaiming note the First Division affirmed the Lord Ordinary's judgment upon the first point, but reserved their opinion upon the second.

38. The matter was further considered in *The Clydesdale Bank, Ltd.* v. *M'Intyre*.[4] In that case the bank were infeft under an absolute disposition, qualified by a deed of declaration which was not recorded until after their debtor had become bankrupt. On account of the form of the security they had to pay the feu-duties to the superiors, and having failed to sell the subjects they raised an action against the debtor with the view of getting rid of their liability In this action a defence to the effect that, under the Bankruptcy Act, the bank by valuing their security had taken over the subjects as proprietors,

[1] 1851, 13 D. 912 ; 1853, 1 Macq. 358.
[2] See also *Millar* v. *Small*, 1853, 1 Macq. 345.
[3] *Marshall's Tr.* v. *Macneill & Co.*, 1888, 15 R. 762.
[4] 1909 S.C. 1405.

was repelled. This judgment proceeded upon the theory that it is a necessary part of the transaction between debtor and creditor that the latter is not to remain in the title to the property longer than it is for his (the creditor's) interest: hence that the debtor must take the property back.[1]

39. The decision in the last-mentioned case shews what the creditor may do to terminate his liability. He is entitled to raise an action against his debtor, the true owner, to have it found and declared that the latter is bound to accept and record a disposition and reconveyance. The summons may also conclude for a decree authorising the creditor, if necessary, to put a warrant of registration on the disposition and reconveyance, and to record it on behalf of the debtor. It would appear that nothing less than this would be sufficient. The creditor cannot be sure that he has escaped liability for obligations attaching to the title until someone else has become infeft. Even this would probably not free him, in a question with the superior, from liabilities which had become enforceable while he was an entered vassal.[2]

Section 14.—Questions between Bondholder and Holder of Absolute Disposition.

40. As between a bondholder and the holder of a security subsequently constituted by absolute disposition, it has been held that the rights of the latter are not those of a proprietor. In a question with purchasers or tenants he may be an absolute owner, but where the competition is with a prior bondholder, each party is considered to be a mere security holder. Thus the disponee infeft under an absolute disposition, qualified by a back-bond unrecorded, attempted to reduce a sale of the security subjects carried out by a prior bondholder, on the ground that the latter had failed to observe certain formalities in exercising the power of sale. The Court held that the pursuer was in any event barred by acquiescence from setting aside the sale, but it was further held that in a question with his opponent he was to be regarded not as an owner, but as a security holder.[3]

41. A heritable creditor who had entered into possession and levied the rents was held bound to relieve a postponed creditor, under an absolute disposition, of feu-duty paid by the latter. This decision proceeded upon the ground that under the absolute disposition the disponee came in the place of the debtor, and the debtor could have compelled the bondholder, as an intromitter with the rents, to relieve him of the feu-duty.[4]

42. In another case the holder of a bond and disposition in security

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[1] See opinion of Lord Justice-Clerk (Hope) in *Gardyne, supra*, 13 D. at p. 923.

[2] *Marshall* v. *Callander and Trossachs Hydropathic Co., Ltd.*, 1895, 22 R. 954; 1896, 23 R. (H.L.) 55.

[3] *Stewart* v. *Brown*, 1882, 10 R. 192.

[4] *Liquidators of City of Glasgow Bank* v. *Nicolson's Trs.*, 1882, 9 R. 689.

obtained from the debtor, in security of an additional loan, an absolute disposition qualified by a back-bond which was not recorded. It was held that the recording of the disposition did not have the effect of extinguishing the first bond *confusione*. This decision was given in a question with the holder of a postponed bond, which had been granted after the date of the first bond, but before the granting of the absolute disposition.[1]

Section 15.—Power to grant Leases.

43. Where a proprietor of heritage in security for repayment of a debt grants an absolute disposition which is recorded, and a relative back-letter is executed but not recorded, the question frequently arises as to the right to grant leases of the subjects conveyed. There is no doubt as to the disponee's right to do so. His title confers upon him all the powers of an owner. Whether the debtor also has the power depends upon the authority of the disponee. The latter may not choose to exercise his right of entering into possession. It often happens that the debtor is allowed to remain in occupation and to administer the subjects exactly as he did before the absolute disposition was executed. As he is held out to the public as owner, leases granted by him are held to have been granted by authority of the disponee. If they have been taken by the lessee in good faith, without knowledge of any limitation of the granter's powers they will be binding on singular successors. The authority conferred may be express, and leases granted in ordinary course of administration will be valid. Authority, express or implied, from the disponee who possesses the title, is the basis of the power of the debtor to grant valid leases.[2]

44. In the cases relating to leases much discussion has taken place as to the nature of the disponee's right under an unrecorded back-letter. The usual expression is that the *radical right* remains with the disponer. Strictly speaking, and according to feudal law, the term radical right applies to the case of a proprietor who has conveyed his estate by a deed which expressly bears to be merely an encumbrance, as, for example, a trust deed for payment of the disponer's debts.[3] In modern practice the term is also used to describe the reversionary right of the granter of an absolute disposition, which entitles him to demand a reconveyance on payment of his debt.

45. Certain observations made by Lord Kinnear in *Ritchie* v. *Scott* [4] have been founded on as establishing that, as the disposition in substance apart from form constitutes a mere security right, the disponee still remains infeft and accordingly as such is entitled to grant leases.[5]

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[1] *King* v. *Johnston*, 1908 S.C. 684.

[2] *Abbott* v. *Mitchell*, 1870, 8 M. 791; *Ritchie* v. *Scott*, 1899, 1 F. 728; *Edinburgh Entertainments, Ltd.* v. *Stevenson*, 1926, S.L.T. 286.

[3] *Campbell of Edderline*, 1801, Mor. Adjudication, App. 11; Bell's Prin., s. 1997; *Union Bank of Scotland* v. *National Bank of Scotland, Ltd.*, 14 R. (H.L.) 1, per Lord Watson at 4.

[4] 1899, 1 F. 728, at 735–6.

[5] See discussion of the *dictum* in *Edinburgh Entertainments Ltd., supra.*

This argument is based mainly on Lord Kinnear's citation of the case of *Bartlet* v. *Buchanan*.[1] There it was held that a widow was entitled to claim terce out of lands which her husband had conveyed by *ex facie* absolute disposition, on which the disponee was infeft, but qualified by a back-bond. The back-bond was recorded even before sasine was taken on the disposition. The ground upon which the decision proceeded was subsequently explained in the case of *Gardyne*[2] thus: The creditor who obtained the absolute disposition was not publicly, but base infeft. The widow's claim was sustained in respect of the subaltern infeftment of the creditor which, by an equitable application of the right of reversion, was held to be a trust for the husband. In all the other cases quoted by Lord Kinnear in the passage cited,[3] either it was expressly stated in the disposition that it was granted in trust or that was judicially admitted. It is plain that his Lordship did not mean to lay it down that, after the absolute disposition has been recorded, the granter remains infeft in the ordinary sense. There appears to be no reported case in which it has been decided that, apart from the mandate of the disponee, the disponer, by virtue merely of his reversionary right, has power to grant leases, or to exercise any of the other powers which belong to a proprietor.

46. Even if the back-letter were recorded, the disponer would not be entitled to grant leases against the will of the creditor. By reason of his infeftment the latter is entitled to manage the property himself.[4]

Section 16.—Damage to Subjects conveyed—Title to Sue.

47. The extent of the interest remaining in the disponer is illustrated by a case where heritable subjects had been damaged by the operations of a third party, while held by a creditor under an absolute disposition. A back-letter shewed that the disposition had been granted in security of a loan. Subsequently the debtor obtained a reconveyance and raised an action of damages against the third party who had caused the injury. It was held that, in respect of his reversionary right, the pursuer had a good title to sue.[5]

Section 17.—Power to Sell.

Subsection (1).—*Conditions of Exercise.*

48. In exercising his power of sale, the proceedings of the disponee must be under the control of equity.[6] He must have due regard to the interests of the true owner. He is not entitled wilfully or recklessly

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[1] 21st Feb. 1811, F.C.; 27th Nov. 1812, F.C. [2] 1851, 13 D. 912, at 922.

[3] Viz. *Campbell of Edderline, supra*; *M'Millan* v. *Campbell*, 1831, 9 S. 551, 1834, 7 W. & S. 441; *Giles* v. *Lindsay*, 1844, 6 D. 771; *Macdowall* v. *Russell*, 1824, 2 S. 574.

[4] *Scottish Heritable Security Co.* v. *Allan, Campbell & Co.*, 1876, 3 R. 333.

[5] *M'Bride* v. *Caledonian Rly. Co.*, 1894, 21 R. 620.

[6] Bell's Com. ii. 271.

or negligently, and in disregard of these interests, to conduct the sale in a manner calculated to prevent the full value from being realised.[1] If there were collusion between the creditor and the purchaser, with a view to a sale at an under-value, the transaction might be set aside. If the purchaser acts in good faith the sale will be protected even although, as in a question with the debtor, the seller may have abused his rights. For a reckless or inequitable use of the creditor's powers the Court will give a remedy, not by setting aside the sale, but by an award of damages.[2] In an action of damages at the instance of the reversionary owner, the vital question will be whether a better price could have been obtained.

49. An intended sale may be interdicted, if the Court is satisfied that no prejudice is likely to arise to the creditor by delay, and that loss may be caused to the debtor by an immediate sale.[3] As a general rule, however, the Court will not interfere.

Subsection (2).—*Sale by Private Bargain.*

50. The question has several times been discussed whether the disponee may sell by private bargain.[4] The principle here applicable is the same as that above stated, viz. that the disponee must exercise his powers so as not to cause unnecessary injury to the debtor. Generally, no doubt, a better price might be expected if the sale took place by public roup, but there is no rule of law to the effect that the disponee under an *ex facie* absolute disposition must not sell by private bargain. The terms of the disposition confer upon him the powers of an absolute proprietor. The onus would be upon the debtor to establish that a sale by private bargain had resulted in loss.[5]

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[1] *Park* v. *Alliance Heritable Co.*, 1880, 7 R. 546; *Simson* v. *M'Millan*, 1770, 2 Pat. App. 227.

[2] *Baillie* v. *Drew*, 1884, 12 R. 199.

[3] *Lucas* v. *Gardner*, 1876, 4 R. 194.

[4] *Duncan* v. *Mitchell & Co.*, 1893, 21 R. 37.

[5] *Park* v. *Alliance Heritable Co.*, *supra*.

ABUSE OF CIVIL PROCESS.

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Section 1.—Litigation.

51. An unsuccessful litigant is not liable in damages because his case turns out to be bad. The only liability he incurs is having to pay the expenses of his opponent,[1] which are not now regarded as damages or awarded as a penalty. The right to raise an action necessarily involves the right to take all steps incidental to its progress, including that of interim execution pending appeal.[2] "Everyone is perfectly entitled to have recourse to the forms of process, and the mere fact that in the end his action turns out to be wrong will not subject him to a claim of damages without the averment of something further. Everyone is entitled to have what the forms of process will give him, and if he obtains a decree which is eventually held to have been a wrong decree, that alone will not give rise to an action of damages."[3] The privilege also extends to taking decree by recording, as in the case of bills and bonds.[4]

52. But if it is clear that a party knows that he has no ground of action, a claim of damages will lie against him, as, for instance, if he takes decree after payment has been made. It must appear, however, that the act was not merely negligent, and therefore the injured party must prove that decree was taken maliciously[5]—as, for instance, that the party taking the decree knew that the debt had been paid.[6] A cheque is not equivalent to a payment in cash, unless there be funds in the debtor's bank to honour it. A cheque dishonoured leaves the debt unpaid, and diligence is still available. The creditor

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[1] *Kennedy* v. *Fort-William Commrs.*, 1877, 5 R. 302.
[2] *Graham* v. *Dundas*, 1829, 7 S. 876; *Cleland* v. *Lauric*, 1848, 10 D. 924.
[3] *M'Gregor* v. *M'Laughlin*, 1905, 8 F. 70, per L.P. Dunedin at p. 74.
[4] *Gardner* v. *Martin*, 1864, 2 M. 1183.
[5] *Rhind* v. *Kemp*, 1893, 21 R. 275. See also *Davies* v. *Brown*, 1867, 5 M. 842.
[6] *Ormiston* v. *Redpath, Brown & Co.*, 1866, 4 M. 488.

does not require to stay proceedings immediately on receipt of a cheque and ascertain if there be funds to meet it. But the cheque must not be retained if it is to be disregarded entirely, for then the debtor is denied the opportunity of paying in cash, and so avoiding the execution of diligence.[1]

53. If, also, a contract has been entered into between opposing litigants (or between a creditor using diligence and his debtor), to delay proceedings for a certain time, an action will lie against the pursuer for taking decree before the time has elapsed. The wrong in this case does not consist in pursuing an action known to be groundless, but in going on with proceedings in face of the contract, and therefore the party aggrieved need only allege that the decree was taken in breach of the contract, and does not require to allege malice.[2] The publication of a debtor's name in a "black list," following upon a decree taken in breach of an agreement not to do so, is a relevant consideration in determining the amount of damages to be awarded.[3] The construction of the contract, if ambiguous, is for the judge at the trial.[4] An intimation to the debtor that, failing a settlement within a specified time, proceedings will be taken, does not import an obligation to abstain from proceedings until the expiry of that time.[5] The ordinary rules as to the incompetency of modifying a written agreement by parole apply in this connection.[6]

Section 2.—Interim Interdict.

Subsection (1).—*Continuing Possession.*

54. Where a person in possession upon an apparently sufficient title is interfered with in the enjoyment of his property, he is entitled to apply for interdict to stop the interference, and will not, in every case, be liable in damages although his title is ultimately found to be bad, unless he has acted maliciously and without probable cause.[7] The judgment of the Court in the original process recalling the interdict is conclusive evidence that the interdict was wrongously obtained. The question of the interdictor's liability is determined by the circumstances of each particular case. A general averment of malice and want of probable cause is all that is necessary, and there is no need to aver specifically facts and circumstances, the onus being on the interdictor to justify his actings. But the damage must be due to the interdict

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[1] *Macdougall* v. *MacNab*, 1893, 21 R. 144.

[2] *MacRobbie* v. *MacLellan's Trs.*, 1891, 18 R. 470; *Sturrock* v. *Welsh & Forbes*, 1890, 18 R. 109.

[3] *Gibson* v. *Anderson*, 1897, 24 R. 556. See also *Gray* v. *Mackintosh & Co.*, 1906, 17 S.L.T. 403.

[4] *Sturrock* v. *Welsh & Forbes*, 1890, 18 R. 109.

[5] *Mackersy* v. *Davis*, 1895, 22 R. 368.

[6] *Turnbull* v. *Oliver*, 1891, 19 R. 154.

[7] *Buchanan* v. *Douglas*, 1853, 15 D. 365; *Kennedy* v. *Fort-William Commrs.*, 1877, 5 R. 302; *Glasgow City Rly. Co.* v. *Glasgow Coal Exchange Co.*, 1885, 12 R. 1287; *Clippens Oil Co.* v. *Edinburgh and District Water Trs.*, 1906, 8 F. 731.

and to no other cause. The loss must be due to the interdictor's act.[1] A person who claimed an exclusive right of ferry, and protected this right by interdict for two years, until his adversary succeeded in a declarator, was found not liable for the loss caused to the adversary by preventing his carrying passengers, as he was not shewn to have acted *in mala fide*.[2] But a landlord was found liable in damages to his tenant where he had deprived the tenant of possession under his lease, though the landlord acted in good faith and on probable cause. The damages were limited to the actual loss sustained.[3]

Subsection (2).—*Inverting Possession.*

55. Where the effect of interdict is to invert possession[4] which has previously existed, the petitioner is held to make his application *periculo petentis*, and is liable for the damage which his interdict has caused, if it has been obtained wrongfully, and no inquiry is required into the *mala fides* or *bona fides* of the application.[5] But the person who complains of the interdict must disclose the invasion of a legal right resulting in a civil wrong for which damages are recoverable.[6] A petitioner, who had interdicted a liquidator from selling certain articles included in the estate under his charge, was held liable in damages where it turned out that the articles belonged to the estate and not to the petitioner;[7] as also were a body of Police Commissioners, who had prevented a man from building on his own ground, in contravention of an *ultra vires* order pronounced by them.[8]

56. Interdicts interfering with rights arising under contract fall under the same rule. It is not necessary for the pursuer to allege that the statements in the petition are false, but he must shew that the interdict was wrongful.[9] Interdicts preventing a contractor from removing his plant at the end of the contract,[10] preventing a mineral tenant from doing the like on the expiry of his lease,[11] and depriving a tenant farmer of possession under his lease,[3] have all been held actionable merely because wrongful. Where the interdictor establishes *bona fides*, liability for damages is limited to the actual loss sustained.[12] As interdict "on caution" does not fetter the respondent until caution has been found,

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[1] *Arnot* v. *Dowie*, 1863, 2 M. 119.
[2] *Moir* v. *Hunter*, 1832, 11 S. 32.
[3] *Miller* v. *Hunter*, 1865, 3 M. 740.
[4] *Jack* v. *Begg*, 1875, 3 R. 45.
[5] *Wolthekker* v. *Northern Agric. Co.*, 1862, 1 M. 211; *Kennedy* v. *Fort-William Commrs.*, 1877, 5 R. 302; *Glasgow City Rly. Co.* v. *Glasgow Coal Exchange Co.*, 1885, 12 R. 1287.
[6] *John Macdonald, Ltd.* v. *Lord Blythswood*, 1914 S.C. 930.
[7] *Fife* v. *Orr*, 1895, 23 R. 8.
[8] *Kennedy* v. *Fort-William Commrs.*, *supra.*
[9] *Abel's Exrs.* v. *Edmonds*, 1863, 1 M. 1061; *Reid* v. *Bruce*, 1855, 17 D. 1100.
[10] *Robinson* v. *North British Rly. Co.*, 1864, 2 M. 841.
[11] *Gilmour* v. *Gilchrist*, 1857, 29 S.L.T. 411.
[12] *Clippens Oil Co.* v. *Edinburgh and District Water Trs.*, 1906, 8 F. 731; aff. 1907 S.C. (H.L.) 9.

an action for damages for interdict granted "on caution" does not lie where caution was never found.[1] A public authority which seeks to interdict one of its servants from continuing his employment when it could have suspended or dismissed him will not be held liable although the interdict was irregularly obtained.[2]

Section 3.—Diligence.

Subsection (1).—*General Rule.*

57. The general rule of law is that where a litigant uses any right or remedy to which he is entitled, and for which no special warrant is required, he can never be made liable for the consequences of its use unless it be shewn that the use was prompted by some oblique motive.[3] But there is a distinction between diligence which follows in the ordinary course of process and diligence which can only be obtained on *ex parte* application and on the strength of *ex parte* statements. Arrestments on the dependence are an example of the former, and interim interdicts or *meditatio fugæ* warrants are examples of the latter form of diligence. In the latter case the mere want of success shews the use of the diligence to have been wrongous. It is always employed *periculo petentis*, and is based on the truth of the *ex parte* statements. The unsuccessful use of diligence in the ordinary course of process is not necessarily a wrong on which damages will follow.[4]

58. A creditor using diligence is bound to see that it is regular and regularly executed, for if the diligence is bad, and open to reduction upon the ground of irregularity, the creditor is liable on that account alone, and no proof of malice or wrongful motive is required.[5] On the other hand, where the diligence itself is regular, though proceeding upon a decree which turns out to be subject to reduction, the creditor will not be liable because the diligence is thereby invalidated,[6] unless the decree has been plainly irregular, as, for instance, from having been pronounced by an incompetent Court, or from being *ultra petita* and disconform to the conclusion of the summons.[7] The decree must be reduced before the party alleging the wrong can raise his action. Where reduction is incompetent, an action of damages is also incompetent, except in cases where diligence has not proceeded upon an ordinary decree, as in the case of diligence on a protest of a bill following upon improper presentation,[8] or after payment,[9] or where decree has been taken in breach of

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[1] *Wilson* v. *Gilchrist*, 1900, 2 F. 391.
[2] *Aird* v. *Tarbert School Board*, 1907 S.C. 305.
[3] *Wolthekker* v. *Northern Agric. Co.*, 1862, 1 M. 211, per L.J.-C. Inglis.
[4] *M'Gregor* v. *M'Laughlin*, 1905, 8 F. 70.
[5] *Gibb* v. *City of Edinburgh Brewery Co.*, 1873, 11 M. 705; *M'Robbie* v. *MacLellan's Trs.*, 1891, 18 R. 470.
[6] *Keene* v. *Aitken*, 1875, 12 S.L.R. 308.; *Bell* v. *Gunn*, 1859, 21 D. 1008; *Aitken* v. *Finlay*, 1837, 15 S. 683.
[7] *Wilson* v. *Alexander*, 1846, 9 D. 7; *Garrioch* v. *Wilson*, 1851, 13 D. 1377.
[8] *Buchan* v. *Melville*, 1902, 4 F. 620.
[9] *Gibb* v. *City of Edinburgh Brewery Co.*, *supra*.

an agreement not to take it. But if the decree is unexceptionable and diligence is regular, the creditor incurs no liability for the damage done to the debtor. There is no action for oppressive use of diligence, and a creditor may proceed by way of diligence, although there is another way open to him which would be less injurious to the debtor.[1]

Subsection (2).—*Irregularity in Diligence.*

59. Where diligence is being used, every step must be accurate or an action of damages may result. While an irregularity in the execution of a diligence will found an action,[2] it seems clear that for trifling inaccuracies in the execution, which plainly can cause no loss to the debtor, no damages can be recovered.[3] Where the mistake is plainly apparent to the debtor on the face of the papers, it may not even invalidate the diligence, as where a mistake in a date in the execution was obvious by reference to the decree.[4] A trifling misnomer, also, in the designation of the debtor will not subject the creditor to damages,[5] although the diligence may in consequence be suspended.[6] But a charge against the wrong person, or against a person in the wrong capacity, for instance, against a person as an individual instead of against him as a trustee, is bad and actionable.[7]

60. Where a tender is made of the sum due, together with the expenses of extract or summons, the creditor may not proceed further with his diligence.[8] A tender may be made to the agent or his clerk, but apparently not to the messenger, as he has no authority to receive money.[9] The debtor making a tender cannot demand delivery of the extract decree. A sist of diligence stays all proceedings, and also renders a creditor liable in damages who goes on with his diligence after he has knowledge of the sist. Formal certioration of the creditor is not necessary.[10] An agreement, also, not to take proceedings for a certain time is binding on the creditor, and if he proceeds in breach of it he is liable.[11] The right to execute summary diligence, and the decree upon which it proceeds, are assignable, and the assignee may proceed with the diligence after presenting his warrants in the Bill Chamber or to the Sheriff-Clerk.

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[1] *Johnson* v. *Commercial Bank*, 1858, 20 D. 790; *Henderson* v. *Rollo*, 1871, 10 M. 104.

[2] *Dick* v. *Murison*, 1845, 8 D. 1; *Henderson* v. *Rollo, supra; Smith* v. *Taylor*, 1882, 10 R. 291.

[3] *Beattie* v. *MacLellan*, 1844, 6 D. 1093.

[4] *Gordon* v. *Sloss*, 1848, 10 D. 1129; *Glen* v. *Black*, 1841, 4 D. 36; *Henderson* v. *Rollo, supra.*

[5] *Spalding* v. *Valentine & Co.*, 1883, 10 R. 1092; *Cruickshank* v. *Gow & Sons*, 1888, 15 R. 326.

[6] *Brown* v. *Rodger*, 1884, 12 R. 340.

[7] *Campbell* v. *Gordon*, 1844, 6 D. 1030; *Forbes* v. *Morrison*, 1844, 6 D. 1113.

[8] *Inglis* v. *MacIntyre*, 1841, 23 D. 1240; *Pollock* v. *Goodwin's Trs.*, 1898, 25 R. 1051; *Alexander* v. *Campbell*, 1903, 5 F. 634.

[9] *Inglis* v. *MacIntyre*, 1862, 24 D. 841.

[10] *Ritchie* v. *Dunbar*, 1849, 11 D. 882.

[11] *Mackersy* v. *Davis*, 1895, 22 R. 368; *Gibson & Co.* v. *Anderson & Co.*, 1896, 34 S.L.R. 631; 4 S.L.T. 48.

Section 4.—Personal Diligence.

Subsection (1).—*Meditatio Fugæ Warrant.*

61. The writ by which the person of a defender is arrested for the purpose of founding jurisdiction against him is called a *meditatio fugæ* warrant. It is a remedy of an exceptional nature in favour of the creditor, and is obtained, as a matter of course, on an *ex parte* statement by him that the person whom he seeks to have apprehended is due him money and is immediately about to leave Scotland without paying. The purpose of the debtor's flight does not require to be set forth.[1] Upon this warrant the debtor is apprehended, and if it be proved that he really means to leave Scotland, imprisonment follows, unless the debtor finds caution *de judicio sisti*. But the creditor is held liable to the debtor if the writ is obtained wrongfully, and neither malice nor want of probable cause require to be shewn.[2] Both creditor and his law agent come under this rule, but the magistrate who grants the warrant is privileged, and against him malice and want of probable cause must be established.[3] Where, however, the proceedings are grossly irregular, the magistrate granting the warrant is equally liable with the person obtaining it.[4]

62. The debt on which the creditor proceeds must exceed £8, 6s. 8d.[5] and be specific,[6] not random,[7] or contingent, except in the case of a claim for inlying expenses and aliment by the mother of an illegitimate child still *in utero*, where, although the amount stated could be only approximate, the warrant was held competent.[8] The debt must be one for which imprisonment is competent, and as such debts are now of only two kinds—(1) taxes, fines, or penalties due to the Crown, and rates and assessment, and (2) sums decerned for aliment[9]—it follows that the warrant is competent only in these two instances.[10] Since the decision in *Hart* v. *Anderson's Trs.*,[10] it is settled that imprisonment under a *meditatio fugæ* warrant of a defender in an action for an alimentary debt is incompetent.[11] As the amount, kind, and resting-owing of the debt can be ascertained definitely, the creditor's liability for an error on these grounds is absolute ; but, with regard to the debtor's intention to abscond, there cannot be the same certainty, and a creditor will not be liable merely because he has entertained a mistaken belief on that point. If his belief was reasonable, he will

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[1] *Jackson* v. *Smellie*, 1865, 4 M. 72.
[2] *Ford* v. *Muirhead*, 1858, 20 D. 949. *Swayne* v. *Fife Bank*, 1835, 13 S. 1003.
[3] *Carne* v. *Manuel*, 1851, 13 D. 1253.
[4] *Laing* v. *Watson*, 1789, Mor. 8555 ; 1791, 3 Pat. App. 219.
[5] *Marshall* v. *Dobson*, 1844, 7 D. 232.
[6] *Pratt* v. *Fleet*, 1826, 4 S. 780 (N.E. 788).
[7] *Campbell* v. *Robertson*, 1847, 20 S.J. 30.
[8] *Davies* v. *Duncan*, 1861, 23 D. 532.
[9] 43 & 44 Vict. c. 34, s. 4.
[10] *Hart* v. *Anderson's Trs.*, 1890, 18 R. 169.
[11] *Glenday* v. *Johnston*, 1905, 8 F. 24.

escape liability,[1] and he does not require to shew what reason the debtor had for meditating flight.[2]

63. The case is different where the creditor is aware that the debtor has no intention of absconding, and the warrant standing unreduced or unchallenged is no bar to an action of damages by the debtor.[3] Cases where it appears the belief was held not to be reasonable were where a debtor was moving from one part of Scotland to another,[4] and where an officer was going abroad to join his regiment.[5]

Subsection (2).—*Civil Imprisonment.*

64. By the Debtor's Act, 1880,[6] imprisonment for debt, with the exceptions already noted above, has been abolished. It is the most severe form of diligence, and the creditor will be liable if his procedure is irregular or subject to reduction.[7] On the other hand, if the diligence is valid no action will lie against him on account of oppression or malice.[8] The older cases can no longer be regarded as ruling those which may arise hereafter. Imprisonment for alimentary debt can now no longer be used as a right by the creditor, but is only available where the Sheriff is satisfied of the wilful failure of the debtor to pay.[9] Consequently, until the debtor has had an opportunity of satisfying the Sheriff of his inability to pay, the Sheriff has no power to grant a warrant to apprehend, and the creditor must be satisfied with giving a citation. A law agent was held liable in damages who presented a petition to the Sheriff to grant a warrant to commit a debtor to prison, and upon that obtained and executed a warrant to apprehend the debtor and bring him up for examination.[10] Imprisonment upon decrees *ad factum præstandum* has not been affected by the Debtor's Act of 1880.[6] Only decrees ordering the performance of some specified act may be enforced by imprisonment.[11]

Subsection (3).—*Process Caption.*

65. This is a diligence directed against the person, not for recovery of a civil debt, but for vindicating the power of a Court of law over the documents in its possession. If a borrower of numbers of process does not timeously return them, a warrant may be obtained, either by a

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[1] *Ford* v. *Muirhead*, *supra*.
[2] *Jackson* v. *Smellie*, 1865, 4 M. 72.
[3] *Maclean* v. *Colthart*, 1865, 3 M. 719.
[4] *Laing* v. *Watson*, 1789, Mor. 8555.
[5] *Scott* v. *Sandilands*, 1744, Mor. 8549.
[6] 43 & 44 Vict. c. 34.
[7] *MacIntosh* v. *Chalmers*, 1883, 11 R. 8.
[8] *Cameron* v. *Mortimer*, 1872, 10 M. 461.
[9] 45 & 46 Vict. c. 42, s. 4.
[10] *Cook* v. *Wallace*, 1889, 16 R. 565.
[11] *M'Dermott* v. *Ramsay*, 1876, 4 R. 217; *Hendry* v. *Marshall*, 1878, 5 R. 687; *Mackenzie* v. *Balerno Paper Mill Co.*, 1883, 10 R. 1147; *Taylor* v. *Macdonald*, 1854, 16 D. 378; *Stewart* v. *M'Dougall*, 1908 S.C. 315; *Rudman* v. *Jay & Co.*, 1908 S.C. 552.

party to the cause,[1] or by the Clerk of Court,[2] or may be issued by the Court *ex proprio motu*, ordaining the borrower to return them, or, in the event of failure, for his incarceration.[3] The judge who grants the warrant has judicial or absolute privilege, as it is an act *intra vires* of the Court, and necessary for the proper conduct of its business,[2] but the Clerk of Court, or other person using a caption, is liable in damages as in the ordinary case of wrongful diligence, if the warrant is subject to reduction on any ground.[4] Bad faith on the part of the person using the caption, such as proceeding in the knowledge that it was illegal, may be averred in order to aggravate the damages.[5] An innocent principal is liable for the mistake of his law agent.[6]

66. It is the practice for the agent requiring the process to give forty-eight hours' notice to the person who has borrowed the process to return it, and if the request is not attended to the agent requiring the process moves the Clerk to the process to issue caption. Intimation is then made to the borrower that the documents must be returned within forty-eight hours, and if this is unheeded, warrant is granted to apprehend and incarcerate the borrower. A macer of the Court executes the warrant, and if the papers are not delivered to him he may apprehend and imprison the person. When a process has been abstracted illegally, instead of being borrowed, or has been removed against the wishes of the Clerk to the process, a caption is not invalid from want of notice, as the possession of the process has been illegal from the first, and there is no need to certiorate the person who has removed it of his illegal detention.[7] In such a case, it is not necessary to proceed by caption at all, and the judge may issue a summary warrant ordering the party to restore the process, and for imprisonment in case of failure, or may commit for contempt of Court. Returning the process after the issue of the warrant will not make its subsequent execution wrongful when the party using the warrant is not informed of that fact.[8] Process caption is incompetent after a long lapse of time.[9]

Section 5.—Arrestment.

67. Arrestment on the dependence of an action which, be it noted, is only competent in summonses containing petitory conclusions other than those for expenses, and arrestment *ad fundandam jurisdictionem*, are of the nature of diligence, and are subject to the ordinary rules as to

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[1] A.S., 11th July 1828, s. 34; C.A.S., C, i. 14.

[2] *Watt* v. *Thomson*, 1868, 6 M. 1112; 1870, 8 M. (H.L.) 77; A.S., 11th July 1828, s. 104; C.A.S., A, iii. 24.

[3] Stair, iv. 47, 23; *Watt* v. *Ligertwood*, 1873, 11 M. 960.

[4] *Hunter* v. *Kerr*, 1842, 4 D. 1175; *Watt* v. *Thomson*, *supra*.

[5] *Hunter* v. *Kerr*, *supra*.

[6] *Pearson* v. *Anderson*, 1833, 11 S. 1008.

[7] *Watt* v. *Thomson*, 1868, 6 M. 1112; 1870, 8 M. (H.L.) 77; 1871, 11 M. 960; *Watt* v. *Ligertwood*, 1874, 1 R. (H.L.) 21.

[8] *Pearson* v. *Anderson*, *supra*.

[9] *Horne* v. *Steele*, 1825, 3 S. 550; *M'Leod* v. *Hill*, 1826, 5 S. 1.

regularity of procedure, and may also become the ground of an action although the procedure has been regular. The nature of the thing arrested is immaterial, but the responsibility of the arrester is the same. But the pursuer of an action using arrestment is not liable in damages because the arrestment has fallen with an action which has failed. And where the procedure is regular, though the arrestment was wrongous, there can be no claim for damages when the property of the debtor was not arrested.[1] A pursuer has a right to use arrestment as a matter of course, and without any special application to the Court, and the privilege he enjoys in raising an action extends to the use of arrestment in connection with it. He may be held liable, therefore, only if he is shewn to have acted maliciously and without probable cause.[2] Averments short of these, such as having acted injuriously and oppressively, will not suffice, and it is not enough to shew that the arrester admitted the unfounded nature of his action by abandoning it.[3] The privilege, however, is not of the order which requires special facts instructing malice to be set forth ; a general averment is sufficient.[4] This averment may relevantly be made against any *persona* which can use arrestments, such as a company.[5]

68. Privilege is lost when the proceedings are irregular, and the injured party can recover damages without establishing either malice or want of probable cause. It is sufficient that he shews the proceedings to have been wrongful. The amount of irregularity required very largely depends on the circumstances of each particular case. Thus a trifling irregularity would probably not be held wrongful and actionable, but such an irregularity as arresting without warrant clearly will.[6] The absence of a warrant in the summons deprives the arrester of privilege. So also does the use of a valid warrant against the wrong person. Thus where, in an action against a person *qua* executor, his private funds were arrested, it was held to be arrestment without warrant, and to render the arrester liable. Such wrongful arrestment gives a right of action without actual damage being shewn.[7]

Section 6.—Inhibition.

69. Inhibition, the process of attaching the heritage of a defender on the dependence of an action, being a diligence in the ordinary right of a pursuer, is privileged to the extent of requiring malice and want of probable cause to be established.[8] It is not competent to use inhibition on the dependence of an action containing no petitory con-

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[1] *Massarella* v. *Murray*, 1897, 5 S.L.T. 68.
[2] *Wolthekker* v. *Northern Agric. Co.*, 1862, 1 M. 211.
[3] *Brodie* v. *Young*, 1851, 13 D. 737.
[4] *Baillie* v. *Hume*, 1853, 16 D. 161 ; *Petersen* v. *M'Lean and Hope*, 1868, 6 M. 218.
[5] *Gordon* v. *British and Foreign Metal Co.*, 1886, 14 R. 83.
[6] *Meikle* v. *Sneddon*, 1862, 24 D. 720.
[7] *Borthwick* v. *Gilkison*, 1863, 2 M. 125.
[8] *Kinnes* v. *Adam*, 1882, 9 R. 702.

clusions except for expenses. On the other hand, inhibition is competent on the dependence of an action of separation and aliment. As execution of inhibition affects the whole heritage of the defender, it is competent for the defender to have it restricted. There is, therefore, no action for oppressive use in respect of the amount of property affected. When a defender who might have had the inhibition restricted to the subject of the litigation did not enter appearance, and had subsequently to incur expense in clearing the record, he was held not entitled to recover this expense from the original pursuer.[1]

Section 7.—Poinding—Personal.

70. Poinding, as the next step in diligence after the expiry of a charge, is subject to the same rule as the charge in respect of regularity of proceedings. Where there has been no irregularity in the diligence it is necessary to found an action to aver that it was executed maliciously and without probable cause. It is sufficient, however, to aver that the poinding was wrongful if it has proceeded on a defective warrant, or has been used unjustifiably, or where the procedure has been irregular. A poinding, for instance, is wrongful if there is a mistake in the date of the charge, and a right of action arises although no actual damage has been sustained.[2] But if the proceedings have been regular in form, the poinding creditor is not necessarily liable in damages because the poinding may be bad. Something more than a mere mistake is required, such as a reckless disregard of the debtor's interests.

71. Poinding is not limited to the exact amount of the debt, but poinding largely in excess of the amount of the debt[3] will establish a case of oppression. Similarly aggregating a great number of articles[4] without putting a separate value on each, and selling articles largely in excess of the debt, or intentionally attaching such conditions to the sale, or conducting it in such a way as to deter buyers,[5] have been held to be oppressive and actionable. But if the way in which the sale is conducted has been allowed by the judge of the roup, without remonstrance by the debtor, the latter may be barred from afterwards questioning it.[6]

Section 8.—Poinding of the Ground.

72. It is an incident of this form of diligence that goods of third parties on the debtor's lands may be included in the poinding. Originally the poinding attached all the goods on the lands, and though

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[1] *Macleod* v. *Macleod*, 1836, 15 S. 248.
[2] *Beattie* v. *MacLellan*, 1844, 6 D. 1088.
[3] *MacKinnon* v. *Hamilton*, 1866, 4 M. 852; *Hamilton* v. *Emslie*, 1868, 7 M. 173.
[4] *Le Conte* v. *Douglas*, 1880, 8 R. 175.
[5] *Robertson* v. *Galbraith*, 1857, 19 D. 1016.
[6] *Kennedy* v. *Creyk*, 1887, 15 R. 118.

this rule has been altered, no action will lie merely on account of third parties' goods being poinded.[1] These goods may be withdrawn on application to the Court,[2] and as the poinding creditor has no sure means of distinguishing what belongs to the debtor and what does not,[3] he is not liable in damages to a third party whose goods have been erroneously attached.[1]

Section 9.—Sequestration.

73. As sequestration differs from both litigation and diligence, having the appearance of the former and the effect of the latter, neither of the general rules previously laid down for those proceedings is altogether applicable. A petition for sequestration, although followed by diligence of the most sweeping kind, is not in itself diligence, but is rather a judicial proceeding like an ordinary action. The prayer of the petition is not granted as a matter of course, but only after intimation to the bankrupt, who may appear and oppose. Consequently, a person complaining of having been illegally sequestrated must shew that it was done maliciously and without probable cause,[4] for any creditor duly qualified whose debtor is notour bankrupt has an absolute right to petition for sequestration. A mere technical error or informality in the petition, even where it leads to recall of the sequestration, will not subject the creditor to an action of damages.

74. If, however, the sequestration is bad from having proceeded on a false statement in the petition, the petitioner is not privileged, but is liable just as in the case of warrants granted on special application. Thus, if an award is bad on the merits, as where the debt is fictitious, or notour bankruptcy does not exist,[4] or there is an expired charge of six days when it should be fifteen, an averment that the sequestration was wrongful will support an action without the necessity for averments of malice and want of probable cause.

75. A trustee in a sequestration is privileged while acting as such. But if he exceeds his powers, as by causing an auctioneer, without warrant or judicial authority, to enter the house of the father of the bankrupt and inventory the furniture and effects therein, the irregularity destroys the privilege.[5] A trustee, or judicial factor on a bankrupt's estate, is entitled by virtue of his appointment to enter and ransack the bankrupt's house and lockfast places therein, and no action will lie against him at the instance of the bankrupt's wife on the allegation that he wrongfully and without warrant forced open the door of a room which was locked and examined the effects

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[1] *Nelmes & Co.* v. *Gillies*, 1883, 10 R. 890.
[2] *Lindsay* v. *Wemyss*, 1872, 10 M. 708 ; *Thomson* v. *Scoular*, 1882, 9 R. 430.
[3] *MacLachlan* v. *Bell*, 1895, 23 R. 126.
[4] *Kinnes* v. *Adam*, 1882, 9 R. 698.
[5] *Houlden* v. *Couper*, 1871, 9 S.L.R. 169.

therein, although informed that the effects in that room belonged entirely to her.[1]

Section 10.—Landlord's Sequestration.

76. This being a remedy granted by the Court on a special application, the applicant is held to apply at his own risk, and to guarantee the facts on which he grounds his application.[2] It thus differs from mercantile sequestration in being a diligence granted entirely on an *ex parte* statement, and consequently, to sustain an action, it is not necessary to set forth malice and want of probable cause.[3] The landlord will not be allowed to plead in defence that he had good reason for believing his statement to be true. The fact that there has been no previous demand for payment is no ground for an action for wrongful sequestration.[4] And it appears that a landlord who raises an action of sequestration for rent due and payable will not be held liable in damages where the tenant puts forward a defence or a counter-claim which is well founded.[5] A landlord can recover past-due rent by sequestration as well as by petitory action, and is not liable in damages for a *pluris petitio* in one case more than in the other. Where a landlord sequestrated the effects of subtenants in sequestration proceedings directed against the principal tenant who had sublet without the consent of the landlord, the landlord was held not liable in damages in an action brought against him by the subtenant.[6]

77. An action for damages may also be maintained on the ground that the sequestration, though not wrongful and not subject to reduction, has been oppressively used,[7] as where the debt has been paid after the decree,[8] or consigned,[9] or offered.[4] An action will lie where the sale under the sequestration is misconducted, and goods in excess of the creditor's requirements are sold,[10] or a warrant to carry back furniture removed by a tenant is executed without cause or without notice to the tenant.[11] A general warrant to inventory articles in a sequestration does not authorise the breaking open of lockfast places. It should be noted that the Court has always been careful to ensure that warrants to carry back furniture removed by a tenant are only granted on very special grounds. It is not necessary to shew that sequestration

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[1] *MacLachlan* v. *Bell*, 1895, 23 R. 126.
[2] *MacLaughlan* v. *Reilly*, 1892, 20 R. 41.
[3] *Wolthekker* v. *Northern Agric. Co.*, 1862, 1 M. 211; *Watson* v. *MacCulloch*, 1878, 5 R. 843.
[4] *Pollock* v. *Goodwin's Trs.*, 1898, 25 R. 1051.
[5] *Craig* v. *Harkness*, (O.H.) 1894, 2 S.L.T. 307.
[6] *Lippe* v. *Colville*, 1894, 31 S.L.R. 615; 1 S.L.T. 616.
[7] *Macleod* v. *Macleod*, 1829, 7 S. 396.
[8] *Samuel* v. *Mackenzie*, 1876, 4 R. 187.
[9] *Alexander* v. *Campbell*, 1903, 5 F. 634.
[10] *Robertson* v. *Galbraith*, 1857, 19 D. 1016.
[11] *Gray* v. *Weir*, 1891, 19 R. 25 (but see *MacLaughlan*, *supra*); *Jack* v. *Black*, 1911 S.C. 691.

has been used oppressively if the award itself has been illegal.[1] Thus a landlord who had in his possession his tenant's cheque in payment of rent prior to proceedings for sequestration for rent was held liable in damages for wrongous sequestration.[2] If the landlord has not given entire possession before applying for this remedy,[3] or has disallowed a proper deduction from rent,[4] the sequestration is bad, and the landlord will be liable. A landlord who has allowed a greater reduction for rent than he is bound to grant may sequestrate for recovery of the excess allowance he has granted.[5]

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[1] *Miller* v. *Rae*, 1834, 13 S. 699.
[2] *Gilmour* v. *Craig*, 1908, 45 S.L.R. 362.
[3] *Graham* v. *Graham*, 1843, 5 D. 1211; *Munro* v. *M'Geoghs*, 1888, 16 R. 93.
[4] *Oswald* v. *Graeme*, 1851, 13 D. 1229.
[5] *Donald* v. *Leitch*, 1886, 13 R. 790.

ACCEPTANCE

OF OFFER. *See* CONTRACT.
OF BILL. *See* BILL OF EXCHANGE.

ACCEPTILATION.

See OBLIGATION; DISCHARGE.

ACCESS

TO CHILDREN. *See* CUSTODY OF CHILDREN.
TO PROPERTY. *See* SERVITUDE.

ACCESSARY.

See CRIME.

ACCESSIO.

See PROPERTY.

ACCESSION

TO CROWN. *See* CROWN.

TO TRUST DEED. *See* TRUST DEED FOR CREDITORS.

ACCESSORY ACTION.

See ACTION.

ACCESSORY OBLIGATION.

See BOND; CAUTIONARY OBLIGATIONS; OBLIGATION.

ACCIDENT.

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Section 1.—Introduction.

78. Accidents may be divided into two classes—fatal and non-fatal. Fatal accidents fall into three divisions for inquiry: (1) industrial, (2) non-industrial, and (3) cases in which a special inquiry falls to be, or may be, made. Industrial accidents are the subject of inquiry under the Fatal Accidents Inquiry (Scotland) Act, 1895,[1] as amended by the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act, 1906.[2] Non-industrial accidents are the subject of inquiry, privately, by the Procurator-Fiscal, in addition to which the Lord Advocate may order a public inquiry under the 1906 Act.[3] As regards division (3), under certain Acts, the Board of Trade or the Home Office may order a public inquiry. This is a very limited class, and such an inquiry only takes place in exceptional circumstances of a very serious and dangerous nature. The Prisons (Scotland) Act, 1877,[4] also provides for a public inquiry as to deaths in prisons, which includes death by accident.

Section 2.—Industrial Fatal Accidents.

Subsection (1).—*Scope of the Inquiry Acts.*

79. The Acts of 1895 and 1906 extend to and include all cases of death of any person or persons occurring under the following circumstances:—

(*a*) When the person deceased was either employer or employed;

(*b*) When he was engaged in Scotland in an industrial employment or occupation, *i.e.* employment or occupation in the performance or superintendence of any manual labour, or in the working,

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[1] 58 & 59 Vict. c. 36.
[2] 6 Edw. VII. c. 35.
[3] Sec. 3.
[4] 40 & 41 Vict. c. 53, s. 53.

management, or superintendence of machinery, appliances, or animals used in the prosecution of any work. Scotland includes British ships within the three-mile limit, and ships whether British or foreign while in a Scottish port or a Scottish river, or in Scottish waters *intra fauces terræ* (whether within or beyond the three-mile limit). Inquiries are held into deaths from accidents occurring to domestic servants engaged in manual labour such as window-cleaning, etc.

(*c*) When his death was due, or reasonably believed to be due, to accident ; and

(*d*) When such accident occurred in the course of his industrial employment or occupation (1895 Act, ss. 2 and 7).

Subsection (2).—*Proceedings before Inquiry.*

80. Upon the occurrence of a death to which the Act of 1895 extends, the Procurator-Fiscal of the county or district in which the accident has taken place proceeds to collect evidence (s. 3 (1)) ; presents forthwith to the Sheriff a petition craving him to hold a public inquiry (ss. 3 (1), 3 (2), and 4 (1)) ; furnishes to the Sheriff-Clerk the names and addresses of the wife, husband, or nearest known relative, and the employer (if any) of each person killed (s. 3 (1)) ; and cites the necessary witnesses and havers to attend at the inquiry. The Sheriff-Clerk procures the Sheriff's order directing an inquiry to be held (s. 4 (1)) ; and intimates the appointed time and place to

(*a*) The wife, husband, or nearest known relative of each person killed (s. 4 (2)) ;

(*b*) His employer (if any) (s. 4 (2)) ;

(*c*) The nearest consul of the country to which he belonged, if a foreigner ;

(*d*) The master or senior officer of his ship, if a foreign seaman ; and

(*e*) In any case where it is competent for any official or department of H.M. Government, to cause public inquiry to be made under any statute in force, intimation shall be made to such official or department (s. 4 (2)).

He also advertises the same particulars in a newspaper circulating in the district, or, if there be more than one, in two of them (s. 4 (2)).

81. The Sheriff may grant warrant to secure articles for production at the inquiry ; and may inspect premises, machinery, etc., with or without the jury, or grant warrant for their inspection by any named person (s. 5 (2)). The Secretary for Scotland appoints a competent person to hold the inquiry, if the Sheriff is for any sufficient cause unable to do so (s. 4 (3)). The Sheriff-Clerk makes up from the Sheriff Court Jury Book a list of ten common and five special jurors, to serve on all

the inquiries to be held on the same day, whom he cites in the manner provided by statute for the citation of jurors in civil cases (s. 4 (4) and 1906 Act, s. 4). Employers and fellow-servants of persons killed are not competent jurors (s. 4 (6)). No person can be summoned to attend to serve as a juror who resides beyond such distance from the place of inquiry as may from time to time be fixed by the Sheriff with the approbation of the Secretary for Scotland (1906 Act, s. 4).

Subsection (3).—*Proceedings at Inquiry.*

82. The inquiry is open to the public (s. 5 (1)). The Procurator-Fiscal, or, in his necessary absence, his duly qualified depute, attends in the public interest (s. 5 (1)). The following parties may also appear at, take part in, and adduce evidence at the inquiry, either by themselves or by counsel, agents, or other persons allowed by the Sheriff, namely (*a*) the wife or husband and relatives of each person killed in the accident; (*b*) the employer of such person; (*c*) H.M. Inspectors of Mines, Factories, and Workshops in cases of accident in or about mines, factories, and workshops; (*d*) any person engaged under the same employers as deceased; and (*e*) any other person whom the Sheriff considers to have a just interest in the inquiry (s. 5 (3)). The jury is chosen by ballot, in the manner prescribed by the Court of Session Act, 1868,[1] and consists of five common and two special jurors (s. 4 (5)). The statutory provisions as to challenges do not apply, but any person interested in the inquiry may object to a person balloted, and if the Sheriff considers that sufficient cause has been shewn, he does not allow such person to serve upon the jury (s. 4 (6)). The jurors are then sworn according to the existing statutory provisions (1906 Act, s. 4). The Procurator-Fiscal adduces evidence, including such medical or skilled evidence as he considers expedient, in regard to the cause or causes of the death or deaths and the circumstances of the accident (s. 5 (1)). Other parties appearing may do likewise (s. 5 (3)). The examination of any person as a witness or haver does not bar subsequent criminal proceedings against him; but no witness is compellable to answer a question tending to shew that he is guilty of a crime or offence (s. 5 (4)). If there is a possibility of criminal proceedings the witness should be warned by the Sheriff that he need not answer any question tending to shew guilt. It is not usual for the Procurator-Fiscal to ask questions tending to incriminate, but simply to ask the witness if he wishes to make a statement. It is only if such precautions have been followed that it is thought any statements made would be used in subsequent criminal proceedings against the witness. The evidence is taken on oath, the witnesses are subject to cross-examination, and the procedure is similar to that in a trial by the Sheriff and a jury (s. 5 (4)). The evidence is taken down in writing at length or in

[1] 31 & 32 Vict. c. 100, s. 44.

shorthand, as the Sheriff directs, and under his control and supervision (s. 5 (4)). At the conclusion, parties may be heard, including any person authorised by a trades union or friendly society, of which the deceased was a member, and the Sheriff may sum up (1906 Act, s. 2).

Subsection (4).—*Verdict.*

83. The jury return a verdict either unanimously or—after at least one hour's enclosure (s. 4 (8))—by a majority, setting forth, so far as the particulars have been proved : (*a*) when and where the accident and the death or deaths took place ; (*b*) the cause or causes of such accident or death or deaths ; (*c*) the person or persons, if any, to whose fault or negligence the accident is attributable ; (*d*) the precautions, if any, by which it might have been avoided ; (*e*) any defects in the system or mode of working which contributed to the accident ; and (*f*) any other facts disclosed by the evidence which, in the opinion of the jury, are relevant to the inquiry (1906 Act, s. 2). This verdict is recorded in the Sheriff Court Books (s. 5 (5)), and is not competent to be given in evidence, or to be founded on, in any subsequent judicial proceeding, civil or criminal, arising out of the same accident (s. 6).

Subsection (5).—*Proceedings after Inquiry.*

84. The Sheriff-Clerk pays to each juror impanelled five shillings per diem and travelling expenses (s. 4 (9)). He recovers the amount from the county (which includes police burghs) or from a royal or parliamentary burgh within which the accident took place (s. 4 (9)). The Procurator-Fiscal pays to the witnesses cited by him such sums as are allowed to Crown witnesses attending a criminal trial by jury in the Sheriff Court (s. 5 (6)). He obtains from the Sheriff-Clerk a copy of the petition, the recorded evidence or a copy, any reports and productions or copies (if in writing), and a copy of the verdict ; all which, with the usual schedule for the registrar of deaths, he transmits to the Crown Agent (s. 5 (5)). Copies of the petition, evidence, and reports are, on requisition, furnished by the Sheriff-Clerk to H.M. Inspectors of Mines or Factories (s. 5 (5)) ; and copies are also obtainable, on payment, by any person interested (s. 5 (5)). The Act does not alter or affect the existing law and practice as to inquiry and report by the Procurator-Fiscal ; as to the powers of the Lord Advocate to order public inquiries to be held ; or as to criminal proceedings against any person responsible for a death (s. 6).

Section 3.—Non-industrial Fatal Accidents.

85. The Procurator-Fiscal inquires privately into all deaths arising from accident in his district. If such death does not fall under the preceding section as "Industrial," he, as soon as his inquiry is complete,

reports to the Crown Agent. Each case is considered and adjudicated on by Crown counsel, who directs what further proceedings, if any, are to be taken. This inquiry by a Procurator-Fiscal covers every class of fatal accident, and in any case the Lord Advocate may direct a public inquiry to be held under the Act of 1906, s. 3. Under this power the Lord Advocate orders many public inquiries into deaths arising from motor car accidents, fires, and such like.

Section 4.—Special Inquiries.

Subsection (1).—*Prisons.*

86. Under the Prisons (Scotland) Act, 1877,[1] it is the duty of the Procurator-Fiscal to hold a public inquiry on the body of every prisoner who may die (which includes fatal accident) within a prison situated within his jurisdiction. The inquiry is held before the Sheriff.

Subsection (2).—*Home Office Inquiries.*

87. (i) *Mines and Quarries, Factories and Workshops, Explosives.*—Under the Metalliferous Mines Regulation Act, 1872 ;[2] the Coal Mines Act, 1911 ;[3] the Quarries Act, 1894 ;[4] the Factory and Workshop Act, 1901 ;[5] the Notice of Accidents Act, 1906 ;[6] and the Explosives Act, 1875,[7] an inquiry into accidents in mines, quarries, factories, and workshops, and in connection with explosive substances may be directed by the Home Office, who appoint a competent person to hold the investigation, with an assessor or assessors if necessary, and to report to the Secretary of State. The inquiry is in open Court. An inquiry may also be directed to be made by a certifying surgeon into certain cases of injury in factories and workshops under the Police, Factories, etc. (Miscellaneous Provisions) Act, 1916.[8] This is a personal investigation and inspection, the result of which is reported to the Secretary of State.

88. (ii) *Buildings.*—Under s. 105 of the Factory and Workshop Act, 1901,[5] the provisions of that Act, with respect to accidents, are to have effect as if any premises on which machinery worked by steam, water, or other mechanical power is temporarily used for the purpose of the construction of a building, or any structural work in connection with a building, were included in the word "factory," and the purpose for which the machinery is used were a manufacturing process ; and the provisions of the Act with respect to notice of accidents and the formal investigation of accidents are to have effect as if

(*a*) any building which exceeds thirty feet in height, and which

[1] 40 & 41 Vict. c. 53, s. 53.
[2] 35 & 36 Vict. c. 77, s. 20.
[3] 1 & 2 Geo. V. c. 50, s. 83.
[4] 57 & 58 Vict. c. 42.
[5] 1 Edw. VII. c. 22, s. 22.
[6] 6 Edw. VII. c. 53.
[7] 38 & 39 Vict. c. 17, s. 66.
[8] 6 & 7 Geo. V. c. 31, s. 8.

is being constructed or repaired by means of a scaffolding; and

(*b*) any building which exceeds thirty feet in height, and in which more than twenty persons, not being domestic servants, are employed for wages, were included in the word "factory."

Subsection (3).—*Board of Trade Inquiries.*

89. An inquiry may be directed by the Board of Trade into accidents on railways ;[1] on ships or boats ;[2] by pit or boiler explosions ;[3] in the construction, use, working, or repair of any railway, tramroad, tramway, canal, bridge, tunnel, or other work authorised by any local or personal Act of Parliament ; and in the use or working of any traction-engine or other engine or machine worked by steam in the open air.[4] Under the Notice of Accidents Act, 1894, and in railway accidents, the inquiry follows the same general procedure as in inquiries by the Home Office, but in inquiries into boiler explosions, the Court is to consist of not less than two Commissioners (1882 Act, s. 6 (2)). The Merchant Shipping Act lays down special rules and directions for inquiries under that Act.

The Court makes a report to the Board of Trade, which may be made public, stating the causes and circumstances of the accident with any observations thought necessary.[5]

Subsection (4).—*Aircraft.*

90. By the Air Navigation Act, 1920,[6] the Secretary of State for Air may make regulations providing for the investigation of any accident arising out of, or in course of, air navigation, and occurring in or over the British Islands or the territorial waters adjacent thereto, or to British aircraft elsewhere.

Section 5.—Non-fatal Accidents.

91. All non-fatal accidents are usually reported by the police, and the reports are submitted to the Procurator-Fiscal. If he considers the circumstances sufficiently serious, he investigates, and reports to the Crown Agent in the same way as in non-industrial fatal accidents. Inspectors of Mines report to the Procurator-Fiscal non-fatal accidents in mines, so that he may, if necessary, investigate and report.

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[1] Regulation of Railways Act, 1871 (34 & 35 Vict. c. 78), s. 7 ; Railway Regulation Act (Returns of Signal Arrangements, Workings, etc.), 1873 (36 & 37 Vict. c. 76), s. 5.

[2] Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 465 and 466.

[3] Boiler Explosions Act, 1882 (45 & 46 Vict. c. 22), ss. 6 and 7, as amended by the Boiler Explosions Act, 1890 (53 & 54 Vict. c. 35), ss. 2 and 4.

[4] Notice of Accidents Act, 1894 (57 & 58 Vict. c. 28), ss. 1, 2, 3, and Schedule, as amended by the Factory and Workshop Act, 1895 (58 & 59 Vict. c. 37), s. 54 and 3rd Schedule.

[5] 57 & 58 Vict. c. 28, s. 3 (5).

[6] 10 & 11 Geo. V. c. 80, s. 12.

Section 6.—Notice of Accidents.

92. Where there occurs in any employment to which s. 1 of the Notice of Accidents Act, 1894, applies, any accident to an employee, causing death, or bodily injury causing him to be absent for at least one whole day from his ordinary work, his employer shall as soon as possible, and in case of an accident not resulting in death not later than six days after the accident, send written notice to the Board of Trade specifying the particulars of the accident, subject to a penalty not exceeding forty shillings.[1] If the Board of Trade are of opinion that any employment other than those set forth in the schedule to the Act in which twenty persons or more –not being domestic servants–are employed by the same employer, is specially dangerous to life and limb, the Board may direct that s. 1 shall apply to that employment (s. 2 (2)). Any order must be published and laid before both Houses of Parliament (s. 2 (5)).

The Act applies to Government departments, but not to any employment regulated by any Act of Parliament administered by the Secretary of State or by inspectors appointed by him. It does not require notice to be given of any accident requiring to be notified to the Board of Trade by any other Act (ss. 5, 6).

93. Provision is made in the various Acts above referred to for notifying accidents to the Home Office, the Board of Trade, or to an inspector or other Government official, and under certain of these Acts returns of accidents require to be made. Most of these provisions are now superseded by the provisions of the Notices of Accidents Act, 1906.[2] The 1906 Act deals with annual returns of accidents in mines and quarries (s. 1); with notices of accidents in mines and quarries (s. 2);– substitutes subsection 2 (1) for s. 11 of the Metalliferous Mines Act, 1872,[3] both as regards metalliferous mines and as regards quarries. Sec. 4 deals with notices of accidents in factories and workshops, and substitutes the provisions of the section for s. 19 of the Factory and Workshop Act, 1901.[4] Sec. 5 (1) empowers the Secretary of State to extend the provisions of the Act as to notice of accidents to any special class of explosion, fire, and other dangerous occurrences in mines or quarries or in factories or workshops.

[1] 57 & 58 Vict. c. 28, s. 1, as amended by 6 Edw. VII. c. 53, s. 6.
[2] 6 Edw. VII. c. 53.
[3] 35 & 36 Vict. c. 77.
[4] 1 Edw. VII. c. 22.

ACCIDENT INSURANCE.

See INSURANCE (ACCIDENT).

ACCOMMODATION WORKS.

See COMPULSORY POWERS; RAILWAY.

ACCOUNTANT.

See COMPANY.

ACCOUNTANT IN BANKRUPTCY.

See COURT OF SESSION; SEQUESTRATION.

ACCOUNTANT OF COURT.

See COURT OF SESSION; JUDICIAL FACTOR; TRUST.

ACCOUNT DUTY.

See ESTATE AND OTHER DEATH DUTIES.

ACCOUNTS.

See CAUTIONARY OBLIGATIONS; DONATION; EVIDENCE; PRESCRIPTION; PRESUMPTIONS.

ACCOUNTING, ACTION OF.

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Section 1.—When Appropriate.

94. An action of accounting—more accurately termed an action of count and reckoning and payment [1]—is the appropriate form of action where the relationship between the pursuer and the defender is, or has been, such that a right on the part of the pursuer to demand an accounting and a duty on the part of the defender to render an account have been created. Thus, each of the relationships of guardian and ward, trustee or executor and beneficiary, principal and agent, law agent and client creates such a right and duty. A bankrupt may sue his trustee for an accounting,[2] but it is incompetent for a discharged bankrupt to sue such an action against his discharged trustee.[3] It is competent for an acceding creditor to a trust deed for creditors to raise an action of accounting against the trustee, the alternative sum mentioned in the conclusions of the summons being the full debt due by the bankrupt to the pursuer.[4] It is not competent for an employer to raise an action of accounting against his employee, as the latter is not an independent person and the account demanded of him could only be made up from the employer's own books.[5]

Section 2.—Conclusions.

95. In an ordinary action of accounting the pursuer asks that [6] "the defender should be decerned and ordained . . . to exhibit and produce . . . a full and particular account of his whole intromissions as factor for the pursuer (*or otherwise, as the case may be*), whereby the true balance due by him to the pursuer may appear and be ascertained . . . And the defender ought and should be decerned and ordained, by decree foresaid, to make payment to the pursuer of the sum of —— sterling, or such other sum as shall appear and be ascertained . . . to be due

[1] Court of Session Act, 1850 (13 & 14 Vict. c. 36), Schedule (A), No. 2.
[2] *Ritchie* v. *M'Intosh*, 1881, 8 R. 747 ; *Hemming* v. *Galbraith*, 1908 S.C. 897.
[3] *Burns* v. *Craig*, 1869, 7 M. 476.
[4] *Raimes, Clark & Co.* v. *Swan's Tr.*, 1902, 10 S.L.T. 316.
[5] *Govan Old Victualling Society, Ltd.* v. *Wagstaff*, 1907, 44 S.L.R. 295.
[6] Court of Session Act, 1850 (13 & 14 Vict. c. 36), Schedule (A), No. 2.

by the defender as the balance of his said intromissions, with the legal interest thereof from the —— day of —— until payment; or in the event of the defender failing to produce an account as aforesaid, he ought and should be decerned and ordained, by decree foresaid, to make payment to the pursuer of the sum of —— sterling, which shall in that case be held to be the balance of the said intromissions, with the legal interest thereof from the said —— day of —— until payment. And whether the said account is produced or not, the defender ought and should be decerned and ordained, by decree foresaid, to make payment to the pursuer of the sum of —— sterling," etc. (*insert conclusion for expenses as in an ordinary action*).

96. The Court, by virtue of the words "or such other sum," etc. in the conclusions, can give decree for a larger sum than the sum specifically mentioned therein.[1] If the pursuer omits to conclude for payment failing the production of said account, the omission may be rectified by amendment.[2] The foregoing form of conclusions has been interpreted as meaning an accounting down to the date of citation.[3] If, therefore, an accounting is desired later than that date and during the dependence of the action, it is advisable to put this into the conclusions.[4] The pursuer may conclude for greater interest than was actually received by the defender on money under the latter's care, *i.e.* the pursuer may demand damages in an action of accounting for the defender's failure to invest properly the sum entrusted to charge.[5]

Section 3.—Condescendence.

97. In view of the present practice of having two records (see Procedure, *infra*), in the latter of which appear the objections in detail to the defender's accounts, it is advisable for the pursuer in the condescendence annexed to the summons (except in the special circumstance set forth under Procedure, *infra*), to limit himself to a concise statement (*a*) of his relationship towards the defender, whereby he is entitled to an accounting; and (*b*) that he has requested the defender to account and that the latter has failed to do so, *or*, that the defender has lodged accounts but that the pursuer is not satisfied therewith in certain particulars. These particulars should not be enlarged upon, but only sufficiently stated to shew that there is a real question of accountancy between the parties.

Section 4.—Defences.

98. The defences most usually advanced are (1) no liability to account; (2) fitted accounts; and (3) that the action is unnecessary as

[1] *Spottiswoode* v. *Hopkirk*, 1853, 16 D. 59.
[2] *Dobson* v. *Hughson*, 1858, 20 D. 610.
[3] Lord Deas in *Wallace* v. *Henderson*, 1875, 2 R. 999, at 1001.
[4] *Wauchope* v. *N.B. Rly. Co.*, 1860, 23 D. 191, at 201.
[5] *Melville* v. *Noble's Trs.*, 1896, 24 R. 243.

the defender has always been willing to account. An example of the first is to be found in the case where a defender successfully pleaded that he was only a servant of the pursuer and consequently was not liable to be sued in an action of accounting.[1] As regards the second ground of defence, an account that is docqueted as correct is held as settled, except as to errors *calculi* or palpable mistakes.[2] Discharge may be presumed from the settlement of a factor's, or other periodical, accounts,[3] but the doctrine of fitted accounts did not exclude a factor whose accounts were settled every half-year from raising an action subsequently for disbursements relative to the period covered by the said settlements.[4] A presumption may also arise from *mora* combined with the actings of parties, or the actings of parties alone,[5] but *mora* of itself is not a good defence.[6] The defence of "fitted accounts" is not available to a law agent where the alleged settlement takes place while the relationship of law agent and client still subsists, and the client is not independently advised.[7]

99. A settlement of an action may be reduced on several grounds, such as fraud, essential error, etc.[8] The mode of settlement of an account in order to be probative depends upon the nature of the account.[9]

Section 5.—Procedure.

100. Where there is no appearance for the defender decree is granted on the Undefended Roll for the sum in the alternative conclusion of the summons. This decree can be recalled in the same way as other decrees in absence. When appearance is entered, procedure is the same as in other petitory actions down to the closing of the record. Should the defender lodge a defence of no liability to account or of fitted accounts, the action at the closing of the record is either sent to the Procedure Roll for discussion on these pleas or the parties may agree that a proof will be necessary before these defences can be disposed of. If sent to the Procedure Roll these defences may be disposed of there on the production of documents and admissions of parties, or the Lord Ordinary

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[1] *Govan Old Victualling Society, Ltd.* v. *Wagstaff, supra.* For another kind of example see *Burns* v. *Craig, supra.*

[2] *Learmonth & Co.* v. *Erskine*, 1823, 2 S. 426 (N.E. 379); *Elder* v. *Smith*, 1829, 7 S. 656; *Macdonald* v. *Mackenzie*, 1829, 7 S. 798; *Forbes Trs.* v. *Edinburgh and Glasgow Union Canal Co.*, 1834, 12 S. 365; *Walker* v. *Drummond*, 1836, 14 S. 780; *Colvil* v. *Jamieson*, 1839, 1 D. 526; *Pollok, Gilmour & Co.* v. *Ritchie*, 1851, 13 D. 640, per L. Cunninghame, 643; *M'Laren* v. *Liddell's Trs.*, 1862, 24 D. 577, per Lord Benholme; *Laing* v. *Laing*, 1862, 24 D. 1362, per L. Cowan; *Ayr Road Trs.* v. *Adams*, 1883, 11 R. 326.

[3] *Walker* v. *Drummond, supra; Glasgow Infirmary* v. *Caldwell*, 1857, 20 D. 1; *Laing* v. *Laing, supra; Fell* v. *Rattray*, 1869, 41 Jur. 236.

[4] *Struthers* v. *Smith*, 1913 S.C. 1116.

[5] *Stuart* v. *Maconochie*, 1836, 14 S. 412; *Russell's Trs.* v. *Russell*, 1885, 13 R. 331.

[6] *M'Laren* v. *Liddell's Trs.*, 1860, 22 D. 373.

[7] *Moir* v. *Robertson*, 1924, S.L.T. 435, and the cases therein cited.

[8] *Laing* v. *Laing, supra*, per L.J.-C. Inglis.

[9] Dickson on Evidence, s. 797 *et seq.*; *Hannay & Sons' Tr.* v. *Armstrong*, 1875, 2 R. 399; affd. 1877, L.R. 2 App. Cas. 531.

may decide that a proof is necessary before these defences can be disposed of.

101. If, as a result of the discussion on the Procedure Roll, or after a proof, the Lord Ordinary decides that there is no liability to account, or that the defender has already accounted to the pursuer, the action comes to an end. If no such defences are put forward, or if the decision of the Lord Ordinary after discussion on the Procedure Roll or after a proof is that the defender is bound to account to the pursuer, the Lord Ordinary orders the defender to lodge accounts in terms of the conclusions of the summons within a certain limited period, and the pursuer to lodge objections thereto within a further limited period. Sometimes the order gives the defender a right to answer the pursuer's objections to the accounts, but if it does not do so the defender, if he so desires, can easily get a further order to that effect.

102. After the accounts, objections thereto, and answers to the said objections have been lodged, a second record is made up consisting of these papers, and the pursuer is ordered to print the same. If the point, or points, at issue are of small amount and not complicated, printing of the second record is sometimes dispensed with, but if so, a clear and distinct copy of the record should be lodged in process for the use of the Lord Ordinary. This second record appears in the usual way in the Adjustment Roll, and after adjustment the record is closed as in other actions. If at the closing of the second record it is obvious to both parties that a proof, either before answer or otherwise, must be allowed, or a remit made to a man of skill, this is then done. Care must be taken, if a remit is made by consent, to provide for either party being entitled to object to the terms of the report on the remit, otherwise the report may be held to be final or the points submitted to report. If, at the closing of the second record, parties are not in agreement as to the procedure to be adopted, the case is sent to the Procedure Roll, where it may be disposed of by the Lord Ordinary in the admissions of parties and the production of documents, or a proof may be allowed, either before answer or otherwise, or a remit may be made to a man of skill. A remit may be made notwithstanding the opposition of either party.[1]

103. Sometimes the dispute between the pursuer and the defender arises over a single item in an account already rendered by the defender to the pursuer. In such cases no second record may be necessary.[2] Where the defender lodges accounts with his defences, it is advisable to follow the usual procedure and take an order for accounts, when the accounts already lodged may be held to be the accounts called for under the order.

[1] *Carron Co.* v. *Stainton's Trs.*, 1857, 19 D. 932; *Western Bank* v. *Baird's Trs.*, 1866, 4 M. 1071.

[2] *Moir* v. *Robertson*, 1924, S.L.T. 435.

ACCRETION.

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Section 1.—Introduction—General Principles.

104. The rule of law denoted by "accretion" is expressed in the maxim, *Jus superveniens auctori accrescit successori*, and may be generally stated as being that where the title of the granter of a conveyance was at the date of its execution incomplete, its subsequent completion will draw back to the date of the conveyance, and make it as effectual as if the granter's title had then been unexceptionable. Although the rule has its most frequent illustrations in feudal conveyancing, it is not technical or feudal in its origin, but is founded on equitable principles equally applicable to conveyances of every kind of property. The fundamental principle is that, where the granter of a conveyance is either expressly, or, from the onerous nature of the transaction, liable in absolute warrandice, he is not only barred from using to the grantee's prejudice rights of whatever nature subsequently acquired by him—whether by succession, or conveyance (or, it has been held, even by statute) [1]—which under his obligation of warrandice he would have been bound to make good to the grantee, but is held *fictione juris* to have possessed these rights from the first, so as to make them available to the grantee without a supplementary conveyance. The same rule obtains where, without a clause of warrandice, the granter conveys for all right which he has acquired or shall acquire.[2]

Section 2.—Between whom does the Rule apply?

105. While it was at one time doubted whether accretion was not in its operation confined to questions between granter and grantee,[3] it has long been settled that it is equally applicable in all questions between competitors deriving right from the common author whose title was originally defective. On the common author's title being completed, that competitor will prevail whose right would have been preferable

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[1] *Viscount Arbuthnot* v. *Allardyce*, 1698, Mor. 7751.
[2] Stair, iii. 2, 2; Ersk. ii. 7, 3.
[3] Stair, iii. 2, 2.

had the title from the first been unexceptionable. Thus a lease granted by a landlord uninfeft was, on his subsequent infeftment, held binding in a question with a disponee to whom he had meantime conveyed.[1] So, where several dispositions had been granted by a disponer who remained uninfeft until after all his disponees had taken infeftment, the disponee who first took infeftment was preferred, negativing the contention that, as all the infeftments were equally invalid until the disponer was infeft, his infeftment must accresce equally to them all. It was further held immaterial that the disponer's infeftment had been procured by the unsuccessful competitor solely with a view to validating his own infeftment.[2] But the retroactive effect obtains only in questions between those deriving right from the same disponer, the completion of title meantime by one holding a right competing with the disponer's interposing, in a question with that competitor, an effectual mid-impediment to the disponee's infeftment being validated as of its date by the disponer's subsequent infeftment.[3]

106. It was until more recently doubted whether accretion could operate where the disponer, at the time of granting the disposition, had absolutely no right, and whether it was not confined to the case where he already had an imperfect right ;[4] but it is now settled that accretion is fully operative, even in the former case.[5] Accretion will thus operate equally whether the disponer acquires, or merely completes, his right subsequent to the date of the disposition granted by him.

Section 3.—Illustrations of Rule.

107. It has long been settled that on the disponer's subsequently completing his title, accretion operates in the case of a disponee infeft on a precept originally invalid as flowing from a disponer uninfeft, and also in the case where infeftment has been taken by the disponee on a charter of resignation originally defective, in respect that the procuratory on which it proceeded was inept owing to the granter's being uninfeft, or not being entered with the superior.[6] In a later case,[7] the question arose whether a disposition granted to the disponer after the date of the conveyance by him could be used as a mid link by the disponee thereafter making up his title by notarial instrument. The Lord Ordinary (Lord Barcaple) thought that it could not ; but the judges of the First Division, although finding it unnecessary to decide the question, were unanimously of opinion that it could ; and Lord Kinloch, with their full concurrence, said : " I think the general principle is that the accruing right is to be considered as, in legal construction,

[1] *Neilson* v. *Menzies*, 1671, Mor. 7768.
[2] *Neilson* v. *Murray*, 1738, Mor. 7773 ; *Paterson* v. *Kelly*, 1742, Mor. 7775.
[3] *Munro* v. *Brodie*, 1844, 6 D. 1249.
[4] Bell, Prin. s. 882 ; *Munro* v. *Brodie*, *supra*, per Lords Ivory and Mackenzie.
[5] *Swan* v. *Western Bank*, 1866, 4 M. 663.
[6] *Henderson* v. *Campbell*, 5th July 1821, F.C. ; *Innes* v. *Gordon*, 1844, 7 D. 141.
[7] *Smith* v. *Waller*, 1869, 8 M. 204.

anterior in date to the disposition which it fortifies in all respects whatever."

108. Another strong illustration of the rule is afforded by a case where precepts of *clare constat*, inept as flowing from a superior whose title was incomplete, were, together with the infeftments taken thereon, validated by the completion of the superior's title after the death of the heir to whom they were granted.[1] Another instructive illustration of the operation of the rule is afforded by the case of *Henderson* already cited.[2] There the granter of two dispositions was infeft but unentered. In both cases the disponee's holding was to be *a me*. Both disponees took infeftment, and the second obtained from the superior confirmation of his own disposition and infeftment, but not of the disponer's. Thereafter the first disponee obtained from the superior confirmation both of his own disposition and infeftment and of the disponer's title. In a competition between the two, it was held that the second, although last infeft, fell to be preferred, on the ground that, as the confirmation rendered the disponer's title complete as from the date of his infeftment, the second disponee's title, being first confirmed by the superior, and therefore first completed had the disponer been originally entered, was preferable. In some early cases [3] it was held that rights acquired by the donatary of a forfeited estate accresced to the forfeited owner on his restoration—decisions which, it is thought, must have proceeded on the ground that the donatary was held to have acquired the rights as trustee for the forfeited owner. A similar principle apparently underlies the decisions in two cases,[4] where rights acquired by an assignee were held to accresce to the cedent on his reducing the assignation.

Section 4.—Title must be completed in Person of Disponer himself.

109. But accretion, even although the other requisite conditions be present, will not operate where a title is subsequently completed, not in the person of the disponer whose title was defective, but only in the person of someone representing him. Thus although, at common law, an heir was liable to make good his ancestor's warrandice, yet his infeftment did not validate an infeftment taken on a precept flowing from the ancestor whose title was incomplete,[5] because the infeftment which the heir is bound to give the disponee "cannot proceed on the precept granted by the ancestor, who never acquired any right which entitled him to grant that warrant." Again, where the precept of sasine proceeded from a trustee uninfeft, the disponee's infeftment will not be validated by the completion of the title in the person of the truster.[6]

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[1] *Lockhart* v. *Ferrier*, 1837, 16 S. 76.

[2] *Henderson* v. *Campbell*, 5th July 1821, F.C.; *Innes* v. *Gordon*, 1844, 7 D. 141.

[3] *Earl of Lauderdale* v. *Wolmet*, 1664, Mor. 26; *Earl of Lauderdale* v. *Viscount Oxenford*, 1666, Mor. 27; *Earl of Cassilis* v. *Montgomery*, 1696, Mor. 33.

[4] *Ruthven* v. *Gray*, 1672, Mor. 31; *Duncan* v. *Miller*, 1713, Mor. 39.

[5] *Keith* v. *Grant*, 1792, Mor. 7767 and 2933. [6] *Redfearn* v. *Maxwell*, 7th March 1816, F.C.

So, too, the infeftment of assumed trustees does not accresce to and validate precepts granted by the trustees by whom they were assumed, and none of whom have ever been infeft.[1] So, too, where one having a personal right to lands disponed the *dominium utile* to one person and the *dominium directum* to another, and both took infeftment, the infeftment of the latter did not accresce to that of the former so as to constitute him a proper vassal in the lands.[2]

110. An early case affords a curious illustration of an equitable restriction of the rule.[3] A person who had disponed lands with absolute warrandice on obtaining a bond from the purchaser for the price, having afterwards acquired debts affecting the lands, it was held, in a question between the disponer and other creditors of the purchaser, that the debts did not accresce to the purchaser, but that the disponer was entitled to hold them as a good security to the extent of the unpaid balance of the price ; for the purchaser, not having fulfilled his part of the contract by paying the price, could not have enforced the disponer's warrandice obligation.

Section 5.—Cases to which Rule is Inapplicable.

111. As a consequence of the rule being based on the absolute warrandice of the disponer, there is no room for accretion as to additional rights subsequently acquired by him where the conveyance which he has granted is gratuitous and without absolute warrandice, or is only of a particular right, or expressly of the rights then vested in him, or where the warrandice is only from fact and deed.[4] It is stated in Bell's Dictionary,[5] on the supposed authority of a decision there cited,[6] that "the doctrine applies to gratuitous as well as onerous deeds," but the case cited does not bear this out ; for, although no warrandice was expressed, the conveyance there in question, being granted by an apparent heir in implement of a family arrangement, and therefore onerous, bore to convey "all right title interest claim of right property and possession which the granter her predecessors and authors heirs and successors had have or could claim" in the subjects conveyed. For the same reason, accretion does not apply to the case of a mere consenter, who was not granted warrandice, subsequently acquiring right to the lands conveyed.[7] Again, where the conveyance is not voluntary but judicial, as by adjudication from a person having no title or only a defective title to the lands adjudged, any subsequent acquisition of right by him does not accresce in favour of the judicial disponee,[8]

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[1] *Martin* v. *Martin's Trs.*, 1841, 3 D. 485.
[2] *Morton* v. *Anderson*, 6th July 1813, F.C.
[3] *Graham* v. *Trail's Creditors*, 1746, Mor. 7752.
[4] Stair, iii. 2, 2 ; Ersk. ii. 7, 4 ; *Douglas* v. *Laird of Wedderburn*, 1664, Mor. 7748.
[5] p. 10.
[6] *M'Gibbon* v. *M'Gibbon*, 1852, 14 D. 605.
[7] Ersk. ii. 7, 4 ; *Forbes* v. *Innes*, 1668, Mor. 7759 ; *Stuart* v. *Hutchison*, 1681, Mor. 7762.
[8] Bankt. iii. 2, 18 ; Ersk. ii. 7, 4 ; *Town of Musselburgh* v. *Scot*, 1675, Mor. 7759 ; *Duncan* v. *Nicolson*, 1699, Mor. 7772 ; *Wilson* v. *Webster*, 1836, 14 S. 1117.

because the judicial conveyance merely transmits any right then vested in the debtor, and imposes on him no obligation of warrandice.

Section 6.—Questions undecided.

112. It has been questioned but not decided whether accretion operated in the two following cases :—(*a*) Where the common author's infeftment has proceeded on the diligence of one of the competing parties, does it accresce to all the competitors, or only to the one on whose diligence it proceeded ? The latter view has the support of Stair,[1] and undoubtedly would seem to be in accordance with the principle underlying the rule ; but two later cases already cited[2] in which it was held that where one of several competitors completes the author's title, it accresces to them all according to the priority of their respective infeftments, appear to point to the opposite conclusion. The question, however, is not now likely to arise. The other question was of great practical importance—(*b*) Where the disponer has become bankrupt, will the subsequent completion of title in his person accresce to and validate dispositions or other rights previously granted by him ? It is stated that it will, by two leading writers on Conveyancing, but without any citation of authority ;[3] and the same view is expressed in former editions of a leading work on Bankruptcy,[4] on the authority of two decisions,[5] neither of which cases, however, involved the precise question. On the other hand, it is suggested by Professor Bell, that after bankruptcy no accretion to render valid the securities of particular creditors, to the prejudice of the general body, should take place in consequence of an act of the trustee intended for the general benefit.[6] In his Commentaries, he strongly urges the view that, as accretion rests on the granter's obligation of warrandice, which after his bankruptcy he cannot lawfully fulfil, to the prejudice of the general body of his creditors, "it would be a strange anomaly to hold that what a trustee for creditors generally does in order to complete their rights, should be construed as an act of the bankrupt done in the fulfilment of an obligation which he is prohibited from fulfilling." If the title is completed in the trustee's person, the question of course does not arise. By s. 100 of the Bankruptcy Act of 1913[7] it is now "provided that such completion of title in the person of the bankrupt shall not have the effect of validating *accretione* unperfected rights in favour of any person other than the trustee in any such estate flowing from the bankrupt."

113. Accretion is also used to denote the rule of law by which, in certain cases, the survivors of a class of legatees take the shares of the predeceasers. See Legacies ; Succession ; Vesting in Succession.

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[1] iii. 2, 2.
[2] *Neilson* v. *Murray*, 1738, Mor. 7773 ; *Paterson* v. *Kelly*, 1742, Mor. 7775.
[3] Menzies, p. 785 ; Montgomerie Bell, p. 814.
[4] Goudy, p. 284.
[5] *Edmond* v. *Gordon*, 1857, 3 Macq. 116 ; *Miller* v. *Wright*, 1836, 14 S. 1087.
[6] Principles (s. 882 (5)) ; Commentaries, i. 783.
[7] 3 & 4 Geo. V. c. 20.

ACCUMULATION

OF INCOME. *See* SUCCESSION; THELLUSSON ACT.
OF PRISONERS. *See* CRIME (PROCEDURE).

ACIDS, THROWING.

See CRIME.

ACKNOWLEDGMENT.

See BILL OF EXCHANGE; DISCHARGE; LOAN.

ACQUIESCENCE.

See ADMISSIONS AND CONFESSIONS; BUILDING RESTRICTIONS; PERSONAL BAR.

ACQUIRENDA

OF BANKRUPT. *See* SEQUESTRATION.
OF WIFE. *See* HUSBAND AND WIFE; MARRIAGE CONTRACT.

ACT OF ADJOURNAL.

See JUSTICIARY, HIGH COURT OF.

ACT OF ASSEMBLY.

See CHURCH.

ACT OF GOD.

See CARRIER; INNKEEPER; NEGLIGENCE.

ACT OF GRACE.

See IMPRISONMENT FOR DEBT.

ACT OF PARLIAMENT.

See PARLIAMENT; STATUTE LAW.

ACT OF SEDERUNT.

See COURT OF SESSION.

ACT OF UNION.

See CONSTITUTIONAL LAW.

ACT OF WARDING.

See IMPRISONMENT FOR DEBT.

ACTIO PERSONALIS MORITUR CUM PERSONA.

See ACTION.

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ACTION.

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Section 1.—Definition.

114. An action is the name given to a proceeding in a Court of law by which (*a*) a right is defined, vindicated, or enforced; (*b*) a wrong is redressed by restitution of the right or by reparation for its loss or curtailment; (*c*) the commission or threatened commission of a wrong is restrained; or (*d*) an equitable remedy is given. It was more briefly defined in Roman law, from which the term was taken, as "*Jus quod sibi debetur judicio persequendi*," [1] and is frequently called a suit in popular language and English procedure. It is itself a right, and one of the most important rights, competent to every citizen, and in some cases to persons who are not citizens (see Alien). It has been described as a right in action whose owner asserts its existence by legal process; for whenever attacked or threatened, every right has its appropriate action, and every wrong its appropriate remedy. By right must be understood a right which the law recognises; for there may be imperfect rights, sometimes called moral as distinguished from legal, which the law does not recognise, and imperfect laws which do not recognise all the legal rights which are recognised in better systems of jurisprudence.

Section 2.—Persons entitled to raise.

115. The general right of a person to invoke the jurisdiction of the Court must be clearly distinguished from his title to pursue. In the former case the right is dependent upon the *status* of the individual; in the latter the *status* of the individual may be unimpeachable, while his title to sue in a particular case may be defective.

The general rule is that all persons may invoke the jurisdiction of the Court of Session. Friendly aliens, among whom may be counted foreign sovereigns,[2] come under the rule, so far at least as actions in a

[1] Inst. iv. 6, pr.; D. xliv. 7, 51.

[2] *Yzquierdo* v. *Clydebank Engineering and Shipbuilding Co.*, 1901, 4 F. 319; (H.L.) 31.

private and individual capacity are concerned,[1] although non-resident aliens are usually bound to sist a mandatary to be responsible for the conduct of the cause and for any expenses which may be awarded against the alien.[2]

Any possible objection to an alien's title to sue is obviated by a certificate of naturalisation under s. 7 of the Naturalisation Act, 1870,[3] obtained after the action is raised.[4]

Section 3.—Persons under Incapacity, Total or Partial.

Subsection (1).—*Alien Enemies.*

116. So long as war exists between Great Britain and the country of an alien, the latter has no right to institute or pursue an action in the Court of Session.[5] But in an action raised by an alien enemy who had long resided and traded in Scotland, and who had complied with the provisions relative to aliens enacted after the outbreak of war, it was held that the pursuer had a good title to sue.[6] The date from which a state of war is held to exist is the date of the declaration of war, until which an alien is not disqualified from suing.[7] If an action at the instance of an alien is pending in the Court of Session at the date of the declaration of war with his country, his right to sue is only suspended, and will revive upon peace being declared, the action meantime being sisted.[8] In an old case [9] an enemy alien was held entitled to prosecute a counter action which he had raised before the outbreak of war, but in a recent case,[10] in which an enemy alien was the pursuer of a counter action which had been conjoined with the leading action, the Court sisted process in both actions. The assignee of an alien is in no better position than the alien himself.[11]

117. In the case of *Aitken* v. *Crawford and Martin* [12] it was held that a natural-born British subject had not lost his title to pursue in the Court of Session by residing in a foreign country at war with Britain. During the Great War, however, by the Trading with the Enemy Pro-

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[1] *Poll* v. *Lord Advocate*, 1897, 1 F. 823, Lord Kyllachy, p. 828; 7 & 8 Vict. c. 66; 33 & 34 Vict. c. 14, ss. 2 and 14.

[2] *D'Ernesti* v. *D'Ernesti*, 1882, 9 R. 655; *Dampskibselskabet Neptune and Mandataries* v. *Blasquez*, 1908, 15 S.L.T. (O.H.) 1046.

[3] 33 & 34 Vict. c. 14.

[4] *Goldston* v. *Young*, 1868, 7 M. 188.

[5] *Arnauld* v. *Boick*, 1704, Mor. 10159; *Johnston and Wight* v. *Goldsmid*, 15th February 1809, F.C.

[6] *Schulze, Gow & Co.* v. *Bank of Scotland*, 1914, 2 S.L.T. 455; 1916, 2 S.L.T. 207.

[7] *Blomart* v. *Earl of Roxburgh*, 1664, Mor. 16091.

[8] *Carron* v. *Cowan & Co.*, 26th Nov. 1809, F.C.; *Wright* v. *Hutchison* (17th Jan. 1810), 28th Nov. 1800, F.C., note; *Orenstein and Koppel* v. *Egyptian Phosphate Co.*, 1915 S.C. 55; *Van Uden* v. *Burrell*, 1916 S.C. 391.

[9] *Burgess* v. *Guild*, 12th Jan. 1813, F.C.

[10] *Craig Line Steamship Co.* v. *North British Storage and Transit Co.*, 1915 S.C. 113.

[11] *Johnston and Wight* v. *Goldsmid*, 15th Feb. 1809, F.C.

[12] 10th June 1813, F.C.

clamation No. 2, dated 9th September 1914, "enemy" was defined as including any person of *whatever nationality* resident or carrying on business in the enemy country; and in *Scotland* v. *South African Territories (Ltd.)*,[1] Darling J. held that a British subject, who had been interned in enemy territory in which he had been living when war broke out in pursuance of his employment with the defenders, had no title to sue for the proportion of his salary applicable to the period of his internment.

SUBSECTION (2).—*Outlaws and Convicts under Sentence of Death.*

118. A person against whom sentence of fugitation has passed has no right to invoke the jurisdiction of the Courts either as pursuer or defender,[2] and counsel will not be heard on his behalf.[3] In an early case,[4] where the defender stood fugitate by sentence of the Lords of Justiciary, the Court "found that he was debarred *a defendendo*, not having *personam standi*," but, nevertheless, held that "a proof of the facts was still necessary, which were not to be taken for truth upon the pursuer's averment." In a later case,[5] the Court decerned against the defender, against whom sentence of outlawry had been pronounced, as in absence.

119. When an outlaw has been denounced his moveable estate is escheat, and, in addition, if he continue unrelaxed for the space of year and day, there is an escheat of the life estate to the superior of the fee. The fee itself, however, is not escheat, but remains in the outlaw, who can dispose of it as he pleases.[6] If the sentence of outlawry has not been followed by denunciation, and the outlawry is relaxed, the *status* of the outlaw is restored, and the relaxation has a retrospective effect.[7]

120. Where a person stands convicted of murder, the punishment is death, and confiscation to the Crown of the moveable estate of the convict.[8] In the case of a person convicted of treason, besides the direct punishment of death, the traitor's moveable property and all heritage held by him in fee simple are confiscated.[9] Persons convicted of these crimes, accordingly, have no *persona standi in judicio* with regard to such forfeited estates. Convicts other than those under sentence of death are not debarred from suing.[10]

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[1] 1917, 33 T.L.R. 255.

[2] *Macrae* v. *Macrae*, 1839, M'L. & R. 645, Lord Cottenham, L.C., at p. 659; Stair iii. 3, 15; Ersk. Inst. ii. 5, 60.

[3] *Cheyne and Mackersy* v. *Anderson*, 1828, 6 S. 1061; *Marshall* v. *Irvine*, 1834, 13 S. 179 (note).

[4] *Crombie* v. *Duguid*, 1749, Mor. 10162.

[5] *Cheyne and Mackersy* v. *Anderson*, 1828, 6 S. 1061.

[6] *Macrae* v. *Macrae*, 1839, M'L. & R. 645, Lord Cottenham, L.C., at pp. 657–9; Stair, iv. 47, 10.

[7] *Black* v. *Kennedy and Cameron*, 1825, 4 S. 124 (N.E. 125).

[8] Hume on Crimes, ii. 482; Macdonald's Criminal Law, 3rd ed., p. 130.

[9] Hume on Crimes, i. 546 to 549; Macdonald's Criminal Law, 3rd ed., p. 231.

[10] Mackay, Manual of Practice, p. 142.

SUBSECTION (3).—*Unregistered Companies.*

121. Under the Companies Act, 1862, it was expressly enacted that a company failing to register in terms of s. 209 of that Act should be incapable of suing, but that it should not be incapable of being sued.[1] This Act has been repealed by the Companies (Consolidation) Act, 1908, s. 1 of which prohibits the formation of any company, association, or partnership formed for the purpose of carrying on the business of banking, and consisting of more than ten persons, or formed for the purpose of carrying on any other business that has for its object the acquisition of gain, and consisting of more than twenty persons, unless it is registered as a company under the last-mentioned Act, or is formed in pursuance of some other Act of Parliament, or of letters patent, or is a company engaged in working mines within the stannaries and subject to the jurisdiction of the Stannaries Court.[2] Such unregistered companies are consequently illegal and, it is thought, have no right to sue or be sued by a common name.[3]

SUBSECTION (4).—*Insane Persons.*

122. An action cannot competently be raised in the name of a fatuous or furious person, even although he has not been cognosced, and the intention is to have a *curator ad litem* appointed.[4] The proper instance, if he has been cognosced, is that of his tutor-at-law or tutor-dative. If he is uncognosced, the proper course is to proceed by brieve of cognition under the Court of Session Act, 1868, s. 101, and thereafter the action is raised in the name of the lunatic's tutor-at-law or tutor-dative; or a petition may be presented for the appointment of a *curator bonis*, at whose instance the action may proceed. In a case where the report on a petition for the appointment of a *curator bonis* had been boxed to the Court, and the petitioners intimated that they had taken out a brieve of cognition, the Court, on their motion, superseded the petition pending the result of the brieve.[5] In a later case, the Court did not supersede the petition for appointment of a *curator bonis*, but appointed the nearest male agnate of the incapax *interim curator bonis* pending the result of the brieve.[6] But when a tutor or curator-at-law is served after cognition a prior appointment of a *curator bonis* comes to an end.[7]

A charge given in the name of an insane person directing the debtor to pay to the *curator bonis* of the *incapax* has been sustained.[8]

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[1] 25 & 26 Vict. c. 89, s. 210; *Findlay* v. *Crabb*, 1886, 13 R. (J.) 53, Lord Justice-Clerk Moncrieff at p. 54.
[2] 8 Edw. VII. c. 69.
[3] *In re Day*, 1876, 1 Ch.D. 699.
[4] *Wallace*, 1830, 9 S. 40; *Reid* v. *Duff*, 1839, 1 D. 400; *Mackenzie*, 1845, 7 D. 283.
[5] *Irving* v. *Swan*, 1868, 7 M. 86.
[6] *Simpson* v. *Simpson*, 1891, 18 R. 1207.
[7] *Young* v. *Rose*, 1839, 1 D. 1242.
[8] *Yule* v. *Alexander*, 1891, 19 R. 167.

123. An action against a cognosced lunatic may be directed against his tutor alone, but if the lunatic has not been cognosced he must be called as a defender, an action against his *curator bonis* alone being incompetent.[1]

124. Where a party to an action becomes insane during the dependence of the cause the proper procedure is to apply for the appointment of a *curator bonis* in common form, and not, by motion, for the appointment of a curator *ad litem*.[2] If, however, the relatives of the *incapax* do not petition for the appointment of a *curator bonis*, the Court may, on the motion of the opposite party,[3] or *ex proprio motu* after the circumstances have been explained by the opposite party,[4] appoint a curator *ad litem*. In a recent special case [5] one of the parties presented a note to the Court stating that another party to the case was insane and had no *curator bonis*, and craved the Court to appoint a curator *ad litem* to her. The Court appointed a curator *ad litem*, who lodged a minute stating that, so far as he could ascertain, a curator *ad litem* had never been appointed to an insane party to a special case. The Court, without pronouncing any interlocutor, intimated that they did not consider it necessary that a *curator bonis* should be appointed, and allowed the case to proceed. The competency of the course adopted was doubted in the case of *Macdonald's Tr.* v. *Medhurst*,[6] in which Lord Johnston laid before the Court an elaborate statement dealing with the practice of appointing curators *ad litem* to minors, pupils, and persons *incapax*, and pointing out that there is something radically inconsistent in our law and practice in this matter. His Lordship suggested the propriety of having the question reconsidered when occasion should occur. In a more recent special case,[7] however, in which the case of *Macdonald's Tr.*[8] was cited, the Court, without delivering opinions, appointed a tutor *ad litem* to two pupil children who were parties to the case, and who, being resident in England, had no legal guardians qualified to appear on their behalf.

125. It is incompetent for a lunatic to pursue an action for divorce, or for separation and aliment,[9] although an action of divorce for adultery may be brought against a lunatic spouse for an act of adultery committed when sane.[10] In actions of divorce on the ground of desertion, where the defender is insane at the date of the proof, and is shewn to have been insane during the four years necessary to found an action of divorce on the ground of desertion, the action will be dismissed,[11] but where the insanity has only commenced after the expiry of four years' desertion the action is competent.[12]

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[1] *Govan* v. *Thomson*, 20th Dec. 1814, F.C.
[2] *Anderson's Trs.* v. *Skinner*, 1871, 8 S.L.R. 325.
[3] *Mitchell* v. *Whitelock*, 1864, 3 M. 229.
[4] *Walker* v. *Jones*, 1867, 5 M. 358.
[5] *Swan's Trs.* v. *Swan*, 1912 S.C. 273.
[6] 1915 S.C. 879.
[7] *Aitken's Trs.* v. *Miles*, 1921 S.C. 454.
[8] 1915 S.C. 879.
[9] *Thomson* v. *Thomson*, 1887, 14 R. 634.
[10] *Rossie* v. *Rossie*, 1899, 6 S.L.T. (O.H.) 357.
[11] *Gilfillan* v. *Gilfillan*, 1902, 10 S.L.T. (O.H.) 295.
[12] *Scott* v. *Scott*, 1908 S.C. 1124.

Subsection (5).—*Pupils.*

126. A pupil, *i.e.* a male under fourteen or a female under twelve years of age, has no *persona standi in judicio.*[1]

(i) *Action in Right of Pupils.*

127. Where the pupil has a guardian, an action on behalf of the pupil should be raised in the guardian's own name, and the conclusion should be for payment to the guardian in that capacity.[2]

The legal guardian of a legitimate pupil child is the father,[3] but, under s. 2 of the Guardianship of Infants Act, 1925,[4] the mother of a pupil has the like powers to apply to the Court in respect of any matter affecting the pupil as are possessed by the father. On the death of either parent the survivor is the guardian, either alone or jointly with a guardian appointed by the predeceaser.[5] Where both parents have died without appointing a guardian a tutor-dative, if appointed, is the legal guardian. A mother's right to the guardianship of the children by her first marriage is not affected by the fact that she enters into a second marriage.[6]

128. Where the legal guardian has an adverse interest,[7] or refuses to sue,[8] or is incapacitated mentally or otherwise,[9] or where the action is against the guardian,[10] a pupil may sue in his own name. In such cases the Court will appoint a curator *ad litem* to the pupil. But it has been held [11] that the mere fact that the father is permanently resident abroad is no reason why the pupil should sue alone. The appointment of curators *ad litem* to pupils has already been discussed.[12]

129. A father, as tutor and administrator-in-law of his pupil child, can compromise an action on his own terms without the authority of the Court having been obtained,[13] and he is entitled to demand payment of whatever sums may be due to the pupil under the settlement, and can give a sufficient discharge therefor.[14] A mother as the guardian of her pupil child, under s. 4 (1) of the Guardianship of Infants Act, 1925,[15] can

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[1] Ersk. Inst. i. 7, 1–14 ; Bell's Prin., 10th ed., s. 2067 ; *Sinclair* v. *Stark*, 1828, 6 S. 336, Lords Craigie and Cringletie at p. 340.

[2] *Macneil* v. *Macneil*, 1798, Mor. 16384 ; Fraser, Parent and Child, 3rd ed., 208.

[3] *Cochrane*, 1891. 18 R. 456, Lord Young, at p. 458.

[4] 15 & 16 Geo. V. c. 45.

[5] 15 & 16 Geo. V. c. 45, s. 4.

[6] *Campbell* v. *Maquay*, 1888, 15 R. 784.

[7] *Bogie* v. *Bogie*, 1840, 3 D. 309 ; *Ross* v. *Tennant's Trs.*, 1877, 5 R. 182.

[8] *M'Conochie* v. *Binnie*, 1847, 9 D. 791.

[9] *Rankine and Another*, 1821, 1 S. 118 (N.E. 117).

[10] *Macneil* v. *Macneil*, 1798, Mor. 16384 ; *Keith* v. *Archer*, 1836, 15 S. 116, Lord Balgray at p. 118.

[11] *Carrigan* v. *Cleland*, 1907 (O.H.), 15 S.L.T. 543.

[12] See para. 124, *supra.*

[13] *Gow* v. *Henry*, 1899, 2 F. 48.

[14] *Dumbreck* v. *Stevenson*, 1861, 23 D. (H.L.) 1, 4 Macq. 86 ; *Murray's Trs.* v. *Bloxsom's Trs.*, 1887, 15 R. 233.

[15] 15 & 16 Geo. V. c. 45.

grant a valid discharge of sums recovered by the child in an action of damages for the death of its father,[1] or due to the child in terms of an extrajudicial settlement arrived at after an action has been brought on behalf of the child.[2] It is, however, competent for the Court, in special circumstances, to supersede the legal guardian in such cases, and to appoint a factor *loco tutoris* to the children to administer the damages recovered by the children.[3] Where an action has been carried on in name of a pupil, with a curator *ad litem*, and damages have been awarded to the pupil, it is necessary that the pupil should have a tutor or factor *loco tutoris* appointed in order to grant a sufficient discharge to the defender.[4]

130. A tutor and administrator-in-law who raises an action in the interest of a pupil, and is unsuccessful, is personally liable in expenses.[5]

131. An *illegitimate* pupil has no administrator-in-law or tutor-at-law,[6] and the Guardianship of Infants Acts, 1886 and 1925, apply to legitimate children only.[7] Accordingly, an action in right of an illegitimate pupil child should be brought in the name of the pupil alone, to whom, after the case has been brought into Court, a curator *ad litem* may be appointed.[8] It is not appropriate in such a case to appoint a factor *loco tutoris*,[9] although it may be necessary, if an award of money is made for a factor *loco tutoris* to be appointed in order to grant a good discharge to the defender.[10] Where an action was brought at the instance of the mother of an illegitimate pupil child " as tutrix and administratrix and on behalf of " the child, it was held that the fact that both mother and child were domiciled in England, where a rule of Court permits infants to sue by their " next friends," did not make the instance good.[11]

132. Where there is no legal guardian the action is brought in the name of the pupil, and the Judge, after the case has come into Court, will appoint a curator *ad litem*.[12] In this respect an application for compensation under the Workmen's Compensation Acts does not differ from ordinary actions.[13] The doubt which was thrown upon the practice of appointing a curator *ad litem* by Lord Johnston in *Macdonald's Tr.*[14] has been removed by the later decision of the Court in *Ward* v. *Walker*.[15]

[1] *Jack* v. *North British Rly. Co.*, 1886, 14 R. 263.

[2] *Murphy* v. *Smith*, 1920 S.C. 104, Lord President Strathclyde at p. 107.

[3] *Boylan* v. *Hunter*, 1922 S.C. 80.

[4] *Pratt* v. *Knox*, 1855, 17 D. 1006; *Collins* v. *Eglinton Iron Co.*, 1882, 9 R. 500; *Connolly* v. *Bent Colliery Co.*, 1897, 24 R. 1172.

[5] *White* v. *Steel*, 1894, 21 R. 649; *Wilkinson* v. *Kinneil Cannel and Coking Coal Co.*, 1897, 24 R. 1001.

[6] *Cunningham* v. *Smith*, 1880, 7 R. 424.

[7] *Brand* v. *Shaws*, 1888, 16 R. 315.

[8] *Ward* v. *Walker*, 1920 S.C. 80.

[9] *Saunders*, 1821, 1 S. 115 (N.E. 113); *Jackson Walton*, 1850, 12 D. 912.

[10] *Pratt* v. *Knox*, 1855, 17 D. 1006; *Collins* v. *Eglinton Iron Co.*, 1882, 9 R. 500; *Connolly* v. *Bent Colliery Co.*, 1897, 24 R. 1172.

[11] *Jones* v. *Somervell's Tr.*, 1907 S.C. 545.

[12] *Johnston* v. *Johnston*, 1740, Mor. 16346; *Sinclair* v. *Stark*, 1828, 6 S. 336, Lord Balgray at p. 338; *Young*, 1828, 7 S. 220; *Keith* v. *Archer*, 1836, 15 S. 116, Lord Corehouse at p. 118.

[13] *Ward* v. *Walker*, 1920 S.C. 80.

[14] 1915 S.C. 879.

[15] 1920 S.C. 80.

(ii) *Actions against Pupils.*

133. Where the pupil has a guardian, if the guardian is known, both the pupil and the guardian should be called as defenders, and the conclusion should be against both *nominatim.* Where the guardian is not known, the action should be directed against the pupil and his tutors generally.[1] Where a pupil has tutors and they are not called the decree is null,[2] even although the tutors are cited and appearance is entered for the pupil,[3] and a curator *ad litem* has been appointed to him.[4] Formerly, an omission to call tutors could be remedied by bringing a supplementary action,[4] but such an action would appear now to be unnecessary in view of the powers of amendment contained in the Codifying Act of Sederunt, 1913.[5]

134. The pupil should be cited personally or at his dwelling-place. In the case of the tutor a general edictal citation is sufficient.[6] Omission to cite tutors who are called will render the decree null.[7] Where tutors are called, cited, and appear in the process, a decree against the defenders is binding on the pupil. Where they do not appear, but appearance is entered for the pupil, and a curator *ad litem* is appointed to him a decree will be binding on the pupil ; [8] but not where no appointment of curator *ad litem* has been made.[9] The Court will not supersede a guardian or tutor who is under no disability, and who intends to enter appearance and defend on behalf of the pupil, by appointing a curator *ad litem.*[10] But where the tutor is himself the pursuer of the action, the action is raised against the pupil alone, and a curator *ad litem* is appointed after the case is brought into Court.[11]

135. Where the pupil has no guardian the pupil must be called, and must be cited personally, and his " tutors and curators if he any has " must be cited edictally.[12] Where the pupil and tutors have been duly called and cited, and no appearance is entered, decree in absence may be taken. Such a decree is not null and void, although it may be opened up as a decree in absence,[13] the onus, however, lying in that event upon the pursuer of the reduction to shew that the decree was erroneous on its

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[1] Fraser, Parent and Child, 3rd ed., p. 211.
[2] *Crighton* v. *Rossie,* 1573, Mor. 2178 ; *Dalgleish* v. *Hamilton,* 1752, Mor. 2184.
[3] *Earl of Craven* v. *Lord Elibank's Trs.,* 1854, 16 D. 811.
[4] *Thomson's Trs.* v. *Livingston,* 1863, 2 M. 114.
[5] C.A.S., B. i. 5.
[6] *Kinghorn* v. *Collace,* 1626, Mor. 2180 ; *Buchanan* v. *Gray,* 1801, Mor. *voce* Adjudication, App. No. 12 ; *Sinclair* v. *Stark,* 1828, 6 S. 336, Lord Balgray at p. 338.
[7] *MacTurk* v. *Marshall,* 7th Feb. 1815, F.C.
[8] *Agnew* v. *Earl of Stair,* 1822, 1 Shaw's App. 333.
[9] *Ibid.*
[10] *Stuart* v. *Moore,* 1861, 23 D. 595.
[11] *Paterson* v. *Sandilands,* 1617, Mor. 8968 ; *Donaldson,* 1629, Mor. 16253 ; *Calderhead's Trs.* v. *Fyfe,* 1832, 10 S. 582 ; *Studd* v. *Studd,* 1880, 8 R. 249 ; 10 R. (H.L.) 53.
[12] *Crighton* v. *Rossie,* 1573, Mor. 2178 ; *Thomson's Trs.* v. *Livingston,* 1863, 2 M. 114.
[13] *Sinclair* v. *Stark,* 1828, 6 S. 336 ; *Dick* v. *M'Ilwham,* 1828, 6 S. 798 ; *Sinclair* v. *Brown,* 1835, 13 S. 594 ; 1837, 15 S. 770 ; 2 S. & M'L. 103 ; *Grieve* v. *Burns,* 1871, 9 M. 582.

merits.[1] Where a pupil has not appeared in the process it is incompetent to appoint a curator *ad litem* to him.[2]

136. In entail petitions, where the petitioner is the father, or sole tutor, of a pupil on whom the petition is served, service is made upon the pupil alone, and in the course of the proceedings an appointment of curator *ad litem* will be made by the Court.[3] The usual time for such an appointment to be made is after intimation of the petition.[4]

In petitions for the custody of pupil children the Court sometimes appoints a curator *ad litem* to the children, and obtains from him a report upon the circumstances and the wishes of the children,[5] but the practice varies, a remit to a reporter being sometimes made.[6]

Subsection (6).—*Minors.*

(i) *Where a Minor is Pursuer.*

137. A minor *pubes* is not under legal incapacity, although, if he has curators their consent is necessary to certain acts.[7] He may sue an action alone, but the defender is entitled to insist that his guardians concur or that a curator *ad litem* be appointed by the Court. But if no objection is raised by the defender, and decree is pronounced in favour of the minor, the defender is barred *personali exceptione* from challenging the validity of the decree. But if the decree is against the minor, and the guardian has not concurred in the action, and no curator *ad litem* has been appointed, the minor may have the proceedings set aside, on the ground of minority and lesion, within the *quadriennium utile*.[8]

138. If the guardian refuses to concur,[9] or has an adverse interest,[10] or is incapacitated,[11] the Court will appoint a curator *ad litem*. A curator to a minor cannot bring an action without the minor's consent.[12] A curator who gives his consent to an action by a minor merely to make the action competent, and takes no active part in the conduct of the litigation, incurs no liability for expenses to the successful defender.[13] But if he takes a prominent and leading part in the litigation he will be liable along with the minor.[14]

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[1] *Grieve* v. *Burns*, 1871, 9 M. 582.

[2] *Calderhead's Trs.* v. *Fyfe*, 1832, 10 S. 582; *Mackenzie's Tr.* v. *Mackenzie*, 1908, S.C. 995.

[3] C.A.S., C. v. 1 (*d*).

[4] *Inglis*, 1855, 17 D. 1005.

[5] *Morrison* v. *Quarrier*, 1894, 21 R. 889; *Fisher* v. *Edgar*, 1894, 21 R. 1076.

[6] Cf. *Walter* v. *Culbertson*, 1921 S.C. 490.

[7] *Harvey* v. *Harvey*, 1860, 22 D. 1198; *Hill* v. *City of Glasgow Bank*, 1879, 7 R. 68.

[8] *Sinclair* v. *Stark*, 1828, 6 S. 336, Lord Balgray at p. 338; *Cunningham* v. *Smith*, 1880, 7 R. 424, Lord President Inglis at p. 425; Ersk. Inst. I. vii. 35, 38.

[9] *M'Connachie* v. *Binnie*, 1847, 9 D. 791.

[10] *Saunders*, 1821, 1 S. 115 (N.E. 113).

[11] *Rankine*, 1821, 1 S. 118 (N.E. 117).

[12] *Allan* v. *Walker*, 1813, Hume's Dec. 586; Bell's Prin. s. 2096.

[13] *Armstrong* v. *Thompson*, 1895 (O.H.), 2 S.L.T. 537.

[14] *Fraser* v. *Cameron*, 1892, 19 R. 564; *Docherty* v. *Glasgow Tramway and Omnibus Co.*, 1895 (O.H.), 2 S.L.T. 406.

139. Where the minor has no guardian he may sue alone,[1] but the defender is entitled to insist that a curator *ad litem* be appointed.[2] The practice where a minor is a party to a special case has been discussed above.[3]

140. Where a minor recovers a sum of money in name of damages the practice with reference to the disposal of the money has varied. In one case the Court insisted on an application for the appointment of a *curator bonis* being made ;[4] in another case the Court directed the money to be paid to a person named by the Court, to be held in trust, and the interest applied for behoof of the minor until she attained the age of twenty-one ;[5] while in *Jack* v. *North British Railway Co.*[6] the money was directed to be paid to the minors themselves.

(ii) *Where a Minor is called as Defender.*

141. Where the minor has a guardian the curator, if known, should be called *nominatim* as a defender, but the minor himself must also be called.[7] If the curator is not known, the action should be directed against the minor "and his tutors and curators, if he any has." Both the minor and his curator, if known, should be cited personally or at their respective dwelling-places ; personal citation of the curator is not, however, necessary.[8] Where he is cited personally edictal citation is superseded.[9] If the minor is a female and married, her husband is her curator,[10] and should be called as a defender. Where the curator has not been called in addition to the minor the proceedings are not on that account rendered null.[11] The instance may now be amended by inserting the name of the curator and serving the action upon him in terms of the Codifying Act of Sederunt, B. i. 5, which takes the place of the former procedure by way of supplementary summons.

142. If the minor does not appear, and his curator is not called and cited as a defender, the decree will be a decree in absence, against which the minor may be reponed, or which may be reduced on the ground of minority and lesion within the *quadriennium utile*. If the minor does appear and states that his curator has not been called, the Court may sist process until the curator is called, or, if the latter refuse, until a curator *ad litem* is appointed.[11] If the curator, or the curator *ad litem*, as the case

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[1] *Hill* v. *City of Glasgow Bank*, 1879, 7 R. 68.
[2] *Sinclair* v. *Stark*, 1828, 6 S. 336, Lord Balgray at p. 338 ; *Christie*, 1873, 1 R. 237.
[3] See para. 124, *supra*, and cases of *Macdonald's Tr.* v. *Medhurst*, 1915 S.C. 879 and *Aitken's Trs.* v. *Miles*, 1921 S.C. 454, there referred to.
[4] *Anderson* v. *Muirhead*, 1884, 11 R. 870.
[5] *Sharp* v. *Pathhead Spinning Co.*, 1885, 12 R. 574.
[6] 1886, 14 R. 263.
[7] *King's Trs.* v. *M'Lay*, 1901 (O.H.), 8 S.L.T. 413.
[8] *Buchanan* v. *Gray*, 1801, Mor. Adjudication, App. No. 12 ; *Sinclair* v. *Stark*, 1828, 6 S. 336.
[9] *Cairnoussie* v. *Techmurie*, 1629, Mor. 2181 ; *Lie* v. *Porteous*, 1630, M. 2182.
[10] Married Women's Property (Scotland) Act, 1920, 10 & 11 Geo. V. c. 64, s. 2.
[11] *Cunningham* v. *Smith*, 1880, 7 R. 424.

may be, appears and defends unsuccessfully the decree will be a decree *in foro*, but may be reduced by the minor within the *quadriennium utile*. But where the curator, though called and cited, or the curator *ad litem*, does not defend, the decree is a decree in absence.[1] Neither a minor nor his curator can be compelled to appear and defend an action.[2] If the curator cannot or should not act the Court will appoint a curator *ad litem* to the minor.[3]

143. Where the minor has no guardian it is not absolutely necessary to call his "tutors and curators, if he any has," and to cite them edictally, but in many cases it may be judicious to do so. In a case where a minor bastard was sued, and he appeared and pleaded that the action should be dismissed because no curator had been called, the Court repelled the plea and appointed a curator *ad litem*.[4] If the minor does not enter appearance, the pursuer cannot insist on a curator *ad litem* being appointed to him.[5]

Subsection (7).—*Married Women.*

144. By the Married Women's Property (Scotland) Act, 1920,[6] it is provided that a married woman shall be capable of entering into contracts and incurring obligations, and be capable of suing and being sued, as if she were not married. As a result of this enactment the somewhat anomalous position in which a married woman stood, prior to its date, with regard to her *persona standi in judicio*, consequent upon the alterations made by successive statutes upon the old rule of the common law under which she could not sue without the consent of her husband as her curator and administrator-in-law, has been rectified, and a married woman of full age is now as capable of suing or being sued as an unmarried woman.

Section 4.—Title and Interest to sue.

Subsection (1).—*General Rule.*

145. The pursuer of an action, if called upon by the defenders, must satisfy the Court, before being allowed to enter upon the merits of his case, not only that he is the proper person to pursue the action, *i.e.* that he has a formal title to do so, but that he has a real interest, either as an

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[1] *Anderson* v. *Ferguson*, 1828, 6 S. 1145.

[2] *Sinclair* v. *Stark*, 1828, 6 S. 336, Lord Balgray at p. 338; *Mackenzie's Tr.* v. *Mackenzie*, 1908 S.C. 995.

[3] *Saunders*, 1821, 1 S. 115 (N.E. 113); *Rankine*, 1821, 1 S. 118 (N.E. 117); *M'Conochie* v. *Binnie*, 1847, 9 D. 791; *Stirling*, 1851, 14 D. 206; *Ross* v. *Tennant's Trs.*, 1877, 5 R. 182.

[4] *Cunningham* v. *Smith*, 1880, 7 R. 424.

[5] *Calderhead's Trs.* v. *Fyfe*, 1832, 10 S. 582; *Swan*, 1866, 1 S.L.R. 100; *Mackenzie's Tr.* v. *Mackenzie*, 1908 S.C. 995.

[6] 10 & 11 Geo. V. c. 64, s. 3 (1).

individual, or, if suing in a representative capacity, in that capacity, in the result of the action. "Right without interest will not be sustained in a process either by way of action or objection, and as little will interest without right." [1] An exception to the general rule is to be found in the case of minors and pupils, whose kinsmen are allowed to sue actions against suspect tutors, or for reduction of deeds granted by minors to their lesion and ratified by oath.[2]

Subsection (2).—*Procedure.*

146. The pursuer's title must be correctly set forth on record, otherwise the action will be dismissed.[3] Formerly it was necessary to set forth the title in the summons,[4] but in a case raised in terms of the Court of Session Act, 1850, where the title was correctly set forth in the condescendence although not in the summons, an amendment of the instance was allowed, the Lord Justice-Clerk observing that it was doubtful whether the amendment was required as it was not absolutely necessary that the pursuer's title should be set forth at the commencement of the summons.[5] In any event, should an amendment of the instance be necessary, this can now be done in virtue of the provisions of the Codifying Act of Sederunt, B. 1.[6]

147. The pursuer must have a good title as at the date when the action is brought. A defect in title cannot be cured by a subsequent assignation.[7] But where he has a good right which requires merely formal completion, his title will be good although it is not completed until after action has been brought, as, for example, where he only completes his title by infeftment after raising the action,[8] or where he has paid money to a party *in titulo* to sue and obtains an assignation from that party *pendente processu*,[9] or where a contract has been assigned but the assignation is rescinded by the assignee and decree of rescission is pronounced after action has been raised on the contract by the cedent.[10] Where the pursuer has a right and interest of his own, but of such a nature as to preclude him from suing alone, the consent and concurrence of the person required to give him a good title is sufficient to obviate any objection to his title to sue. But a person who has no right or title whatever cannot sue on action even if he obtain the

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[1] Kames, Elucidations, Art. 32, p. 213.

[2] Ersk. Inst. iv. 1, 17; Stair, i. 6, 26; Act 1681, c. 19.

[3] *Pollock* v. *Mather*, 1829, 7 S. 675; *Young* v. *Tennant & Co.*, 1860, 22 D. 1415; *Traill* v. *Traill*, 1873, 1 R. 61.

[4] Shand's Practice, vol. i., p. 217; *M'Indoe* v. *Lyon*, 1826, 5 S. 92 (N.E. 85); *Gillies* v. *Hunter*, 1871, 9 S. 257.

[5] *Anderson* v. *Duncan*, 1861, 23 D. 258.

[6] *Doughty Shipping Co.* v. *North British Rly. Co.*, (O.H.) 1909, 1 S.L.T. 267.

[7] *Symington* v. *Campbell*, 1894, 21 R. 434.

[8] *Welsh* v. *Rose*, 1857, 19 D. 404; *Cranston & Elliot, Ltd.* v. *Dobson*, 1899, 2 F. 271; *Walker* v. *Hendry*, 1925 S.C. 855.

[9] *Doughty Shipping Co.* v. *North British Rly. Co.* (O.H.), 1909, 1 S.L.T. 267.

[10] *Westville Shipping Co.* v. *Abram Shipping Co.*, 1922 S.C. 571, 1923 S.C. (H.L.) 68.

consent and concurrence of the party who has the sole right and title to sue.[1]

148. Any objection to the pursuer's title must be stated before the record is closed, and a plea of "no title to sue" tabled. Only objections specified on record can be founded on in support of the plea, and it cannot be held as embracing objections which have come to the defender's knowledge only after the record has been closed.[2] Where a record was made up without any preliminary plea of no title, and a proof was allowed of consent to each party, the Court held that, by going to proof, the defenders had waived the objection, and also that it was incompetent for them to plead the objection, in respect that they had stated no plea against the pursuer's title.[3] On the other hand, where a preliminary defence of no title to sue was reserved in a reduction, it was held that, notwithstanding the satisfying of production and pleading on the merits, the plea was not foreclosed.[4]

A principal's right to pursue cannot be questioned by the agent who has derived his right to act from him,[5] nor, where there is a common author, can the defender challenge the pursuer's title.[6]

149. The plea of no title to sue is a preliminary plea, and, if upheld, generally results in the action being dismissed. But if the plea is so bound up with the merits that the latter have to be gone into before the plea can be sustained, the result is a decree of absolvitor, not dismissal.[7]

Subsection (3).—*Title without Interest.*

150. Provided the pursuer has a title to sue and his interest is in a right recognised by law,[8] there are not many cases in which the case has been dismissed for want of interest. The interest need not be pecuniary,[9] nor need it be large.[10] "We are not indeed bound to adjudicate *de lana caprina*; but if there be a pecuniary or patrimonial interest, however small, depending on the determination of the question, the parties have a right to invoke the aid of a Court of law to decide their difference."[11] Accordingly, where there is some interest disclosed, it is matter for the discretion of the Court whether the interest is sufficient.[12]

151. Examples of cases where there is a title but the action has

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[1] *Hislop* v. *MacRitchie's Trs.*, 1881, 8 R. (H.L.) 95; *Yzquierdo y Castaneda* v. *Clydebank Engineering and Shipbuilding Co.*, 1901, 4 F. 319 (H.L.) 31.

[2] *North British Rly. Co.* v. *Brown, Gordon & Co.*, 1857, 19 D. 840.

[3] *Lade* v. *Largs Baking Co.*, 1863, 2 M. 17.

[4] *King's Advocate* v. *Lord Dunglas*, 1836, 15 S. 314.

[5] *Arbouin* v. *Sime*, 1824, 3 S. 184 (N.E. 125).

[6] *Livingston* v. *Warrock*, 1768, Mor. 7847, 6 Pat. 790.

[7] *Baird & Co.* v. *Feuars of Kilsyth*, 1878, 6 R. 116.

[8] Broom, Legal Maxims, 9th ed., 131 *et seq.*

[9] *Magistrates of Edinburgh* v. *Macfarlane*, 1857, 20 D. 156; *Earl of Zetland* v. *Hislop*, 1882, 9 R. (H.L.) 40; *Beattie* v. *Ures*, 1876, 3 R. 634; *Duncan* v. *Duncan*, 1892, 20 R. 200.

[10] *Browne* v. *Orr*, 1872, 10 M. 397, Lord Deas at p. 398.

[11] *Strang* v. *Stewart*, 1864, 2 M. 1015, Lord Justice-Clerk Inglis at p. 1029.

[12] *Beattie* v. *Ures*, *supra*; *Naismith* v. *Cairnduff*, 1876, 3 R. 863.

failed for want of sufficient interest are not numerous, but such cases may arise where, for example, a co-feuar fails to establish an interest to enforce a real burden ; [1] where the party, even if successful, can recover nothing ; [2] and where the maxim *frustra petis quod mox es restiturus* applies.[3] Again, where a pursuer died before the case had been heard in procedure roll, and his executrix, who had no interest in the merits of the case, was sisted in his place, it was held that she ought not to be allowed to proceed with the action merely for the purpose of recovering expenses, and the action was dismissed.[4] The interest may also be too remote to give a title to sue.[5]

Subsection (4).—*No Title in respect that there is no Interest which the Law recognises.*

152. Where the pursuer of an action has no right to maintain his pleas, either in respect that he has no interest to do so or that the right to do so is vested in another, he has no title to sue. The phrase *jus tertii* is frequently used to express the absence of interest in the pursuer, whether or not there is actual interest in another.[6] It is thus explained by Mr Mackay.[7] "There is neither title nor interest where the right to be enforced by the action is vested in another than the pursuer, and the pursuer would derive no benefit from enforcing it." Absence of interest, however, does not mean that no benefit would accrue to the party pleading another's right, but that it is not his right to do so.[8] Thus in *Monteith* v. *Ingels* [9] a superior was found to have no legal title and interest, and it was held to be *jus tertii* to him to sue a reduction of a disposition granted by one of his predecessors on the ground that a decree of adjudication which constituted the defender's title, and on which infeftment was taken, had been obtained in respect of documents that were invalid and ineffectual, although the heir-at-law of the defender in the adjudication might have had a title to reduce.[10]

153. A person has no title to sue in respect of a wrong done to another ; [11] or for damages for being interdicted from doing something which he was subsequently found not entitled to do, although the inter-

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[1] *Mactaggart & Co.* v. *Roemmele*, 1907, S.C. 1318 ; *Maguire* v. *Burges*, 1909, S.C. 1283.

[2] *Smith* v. *Shields*, 1830, 8 S. 553.

[3] *Steele* v. *Young*, 1823, 2 S. 146 (N.E. 134) ; *Burke* v. *Mackay*, 1865, 3 M. 799 ; *Ker's Trs.* v. *Justice*, 1866, 5 M. 4 ; *Liquidators of City of Glasgow Bank* v. *Mackinnon*, 1881, 9 R. 535, L.P. Inglis at p. 586.

[4] *Martin's Exrx.* v. *M'Ghee*, 1914 S.C. 628.

[5] *School Boards of Dunlop and Stewarton* v. *Patrons of Cunninghame Graham Bursaries Endowment Fund*, 1910 S.C. 945.

[6] Kames, Elucidations, p. 214.

[7] Manual of Practice, p. 125.

[8] Bell's Dictionary, *s.v. Jus tertii.*

[9] 1869, 7 M. 523.

[10] See also *Lord Advocate* v. *M'Culloch*, 1874, 2 R. 27.

[11] *M'Lachlan* v. *Bell*, 1895, 23 R. 126 ; *Kilwinning Parish Council* v. *Board of Management of Cunninghame Combination Poorhouse*, 1909, S.C. 829, L.P. Dunedin at p. 837.

dict was recalled as not being the proper remedy in the circumstances ; [1] or for damages for eviction from premises which he had no title to possess ; [2] or for breach of a personal agreement which the law will not enforce.[3]

154. A right to sue for damages does not pass with the property.[4] Accordingly the purchaser of a ship has no claim for injuries done to the ship prior to the purchase,[5] nor has a superior who has entered into possession of his vassal's land by a decree of irritancy a title to sue for damage done to the land while the vassal was in possession.[6] On the same principle, the fact that a bondholder was in possession on an *ex facie* irredeemable title at the time of the injury to the property does not prevent the owner, when reinvested, from having a title to sue in respect of the injury.[7] A superior who has divested himself of his superiority in favour of a third party has no title to sue an action of poinding of the ground for the recovery of arrears of feu-duties prior to his divestiture ; [8] and a superior has no title to pursue an action of maills and duties for recovery of a feu-duty, the nature of such an action being inconsistent with the existence of the contract upon which the right to the feu-duty depends.[9]

Notwithstanding that he may have an interest in the contract, a person who was not a party to it has no title, in the ordinary case, to sue in respect of it, either for implement, reduction, or loss through breach of the contract.[10]

An unsuccessful candidate for a bursary has no title to sue a declarator that he was elected on the ground that the elected candidate was ineligible, although he may have a claim for damages *ex delicto*.[11]

155. A claim of damages and *solatium* arising out of the death of a person through the fault or negligence of another is competent only at the instance of a wife for the death of her husband, a husband for the death of his wife, a parent for the death of his child, and a child for the death of his parent. Accordingly a claim by collaterals, or by persons other than those mentioned, is not maintainable,[12] and where there is more

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[1] *Jack* v. *Begg*, 1875, 3 R. 35.

[2] *Macdonald* v. *Watson*, 1883, 10 R. 1079.

[3] *Murdison* v. *Scottish Football Union*, 1896, 23 R. 449, Lord Kinnear at pp. 466–7.

[4] *Burrell* v. *Simpson & Co.*, 1876, 4 R. 177, L.P. Inglis at p. 180.

[5] *Symington* v. *Campbell*, 1894, 21 R. 434.

[6] *Caledonian Rly. Co.* v. *Watt*, 1875, 2 R. 917.

[7] *M'Bride* v. *Caledonian Rly. Co.*, 1894, 21 R. 620.

[8] *Scottish Heritages Co.* v. *North British Property Investment Co.*, 1885, 12 R. 550.

[9] *Prudential Assurance Co.* v. *Cheyne*, 1884, 11 R. 871 ; *Nelson's Trs.* v. *Tod*, 1896, 23 R. 1000.

[10] *Finnie* v. *Glasgow and South-Western Rly.*, 1853, 15 D. 523, 1857, 3 Macq. 75 ; *Fleming* v. *Robertson*, 1859, 21 D. 982, 1861, 4 Macq. 167 ; *Blumer & Co.* v. *Scott*, 1874, 1 R. 379 ; *Downie* v. *Magistrates of Annan*, 1879, 6 R. 457 ; *Tully* v. *Ingram*, 1891, 19 R. 65 ; *Campbell* v. *A. & D. Morrison*, 1891, 19 R. 282 ; *Edinburgh United Breweries* v. *Molleson*, 1894, 21 R. (H.L.) 10 ; *Burr* v. *Commissioners of Bo'ness*, 1896, 24 R. 148 ; *Ransohoff and Wissler* v. *Burrell*, 1897, 25 R. 284 ; *Ferguson* v. *Aberdeen Parish Council*, 1916 S.C. 715.

[11] *Ramsay* v. *United Colleges of St. Andrews*, 1860, 22 D. 1328, 1861, 23 D. (H.L.) 8 ; *Martins* v. *MacDougall's Trs.*, 1885, 13 R. 274 ; *M'Donald* v. *M'Coll*, 1890, 17 R. 951.

[12] *Eisten* v. *North British Rly. Co.*, 1870, 8 M. 980, L.P. Inglis at pp. 984, 985.

than one person with a right to sue, they must, apart from specialties requiring separate actions to be raised, all concur in one action.[1]

156. A pursuer has no title to reduce a will where the effect of reduction would be to set up a prior will in which he was excluded, even although he had an interest in having the later deed set aside in respect of an agreement with the beneficiaries under the earlier deed in terms of which he would get a share of the estate.[2]

Subsection (5).—*Jus Quæsitum Tertio.*

157. As has been already pointed out, a person has, in general, no title to sue in respect of a contract to which he is not a party.[3] But where a contract contains a stipulation in favour of a third party, who is named or clearly indicated, and the contract has become irrevocable, that party obtains a vested right upon which he can found and sue. Thus, where in a marriage contract a husband provided his widow with an annuity burdened with a small annuity in favour of his stepmother, and subsequently by his settlement revoked the stepmother's provision, the latter was held to have acquired a *jus quæsitum tertio*, which the husband could not defeat, entitling her to sue the widow for payment of the annuity.[4] Similarly, a destination in favour of the children of the marriage in an antenuptial [5] or postnuptial [6] contract may confer upon them a *jus quæsitum* entitling them to sue under the contract.

Again, where a father took out a policy of insurance on the life of his pupil son, and the policy contained provisions in favour of the son on his attaining majority, including the right to certain options, it was held that, although the father had never delivered the policy to his son and had paid the premiums during the latter's minority, the son, who died after attaining majority, but before the next premium fell due and without exercising any of the options, had acquired a *jus quæsitum* in the policy, and that the proceeds fell to his executrix and not to the father.[7] The law of *jus quæsitum tertio* is examined and discussed in this case by Lord Dunedin in an exhaustive judgment.

158. Questions of *jus quæsitum tertio* probably arise most commonly under feu contracts, where a feuar holding of a common superior may claim to have a *jus quæsitum* to enforce the conditions of the charters of co-feuars to which he is not a party. The cases in which a co-feuar has been held to have a right to enforce a common condition fall, it has been said, under " one or other of two categories, either (1) where the superior

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[1] *Darling* v. *Gray & Sons*, 1892, 19 R. (H.L.) 31, Lord Watson at p. 32 ; *Slorach* v. *Kerr & Co.*, 1921 S.C. 285.

[2] *Swanson* v. *Manson*, 1907 S.C. 426.

[3] See para. 154, *supra*, and cases there cited.

[4] *Warnoch* v. *Murdoch*, 1759, Mor. 7730.

[5] *M'Gowan* v. *Robb*, 1862, 1 M. 141 ; *Earl of Glasgow's Tr.* v. *Earl of Glasgow*, 1872, 11 M. 218 ; *Gillon's Trs.* v. *Gillon*, 1890, 17 R. 435 ; *Macdonald* v. *Hall*, 1893, 20 R. (H.L.) 88 ; *Middleton's Trs.* v. *Middleton*, 1909 S.C. 67 ; *Leslie's Trs.* v. *Leslie*, 1921 S.C. 940.

[6] *Allan* v. *Kerr*, 1869, 8 M. 34.

[7] *Carmichael* v. *Carmichael's Exrx.*, 1920 S.C. (H.L.) 195.

feus out his land in separate lots for the erection of houses, in streets or squares, upon a uniform plan; or (2) where the superior feus out a considerable area with a view to its being subdivided and built upon, without prescribing any definite plan, but imposing certain general restrictions which the feuar is taken bound to insert in all sub-feus or dispositions to be granted by him."[1] In all cases the party who founds on a restriction on the use of property must have an interest to enforce it;[2] but where the superior seeks to enforce the restriction his interest to do so is *prima facie* conceded by the vassal.[3] Where, on the other hand, a feuar seeks to enforce against his co-feuars he must shew that he has an interest to do so.[4] Co-disponees, like co-feuars, may have a *jus quæsitum* in a building restriction, imposed in the title of one of them, so as to enable the others to enforce it.[5]

A *jus quæsitum* may be given by a public statute, but a person founding upon a statutory restriction must qualify an interest.[6]

Section 5.—Title and Interest in particular.

Subsection (1).—*The Lord Advocate.*

159. The Lord Advocate is the proper person to sue and be sued on behalf of the Crown and the Public Departments of State,[7] except in the case of the Admiralty.[8] A change in the person holding the office of Lord Advocate does not affect any action which has been raised by or against the Lord Advocate.[9]

160. The Lord Advocate may sue or defend, on behalf of the public, actions regarding encroachments by private or public bodies on the shores of the realm.[10] He may sue an action of declarator of bastardy or *ultimus hæres*. He has a title to appear in actions of nullity of marriage and of divorce.[11] Where it is necessary to settle a scheme for the administration of any charitable or other permanent endowment, intimation must be made to the Lord Advocate, who is entitled to appear and intervene for the interests of the charity, or any object of the trust,

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[1] *Hislop* v. *MacRitchie's Trs.*, 8 R. (H.L.) 95, Lord Watson at p. 103.

[2] *Tailors of Aberdeen* v. *Coutts* (1840), 1 Rob. 296.

[3] *Earl of Zetland* v. *Hislop*, 1882, 9 R. (H.L.) 40, Lord Watson at p. 47.

[4] *Hislop* v. *MacRitchie's Trs.*, 1881, 8 R. (H.L.) 95, Lord Watson at p. 102; *Mactaggart & Co.* v. *Roemmele*, 1907 S.C. 1318; *Maguire* v. *Burges*, 1909 S.C. 1283.

[5] *Braid Hills Hotel Co.* v. *Manuels*, 1909 S.C. 120; *Botanic Gardens Picture House* v. *Adamson*, 1924 S.C. 549.

[6] *Summerlee Iron Co.* v. *Lindsay*, 1907 S.C. 1161; *Pitman* v. *Burnett's Trs.*, 1882, 9 R. 444; *Scott's Trs.* v. *Shaw*, 1892, 19 R. 895; *Maguire* v. *Smith's Trs.*, 1912 S.C. 410.

[7] Court of Exchequer (Scotland) Act, 1856 (19 & 20 Vict. c. 56), s. 22; Crown, etc., Suits (Scotland) Act, 1857 (20 & 21 Vict. c. 44), s. 1.

[8] 31 & 32 Vict. c. 78, s. 4.

[9] 20 & 21 Vict. c. 44, s. 5.

[10] *Officers of State* v. *Smith*, 1846, 8 D. 711, 1849, 6 Bell's App. 487; *Cameron and Gunn* v. *Ainslie*, 1848, 10 D. 446; *Agnew* v. *Lord Advocate*, 1873, 11 M. 309; *Young* v. *North British Rly. Co.*, 1887, 14 R. (H.L.) 53.

[11] Conjugal Rights (Scotland) Act, 1861 (24 & 25 Vict. c. 86) s. 8; *Paul* v. *Paul*, 1896, 4 S.L.T. 171.

or the public interest.[1] The Lord Advocate may apply to the Court for the appointment of a judicial factor to a lunatic whose property is not duly protected.[2] He may sue for reduction of patents,[3] or prosecute for any wilful falsehood in any oath emitted in connection with the Bankruptcy (Scotland) Act, 1913.[4] There is no distinction between the Lord Advocate, acting for the Crown, and a subject in the matter of expenses.[5]

SUBSECTION (2).—*Concurrence of the Lord Advocate.*

161. The concurrence of the Lord Advocate is necessary in petitions and complaints at common law for breach of interdict.[6] He must also concur in petitions and complaints for fraudulent bankruptcy,[7] or against a trustee in bankruptcy for employing the trust funds in an improper way.[8] Prosecutions for wilful falsehood in any oath made in pursuance of the Bankruptcy (Scotland) Act, 1913, may be either at the instance of the Lord Advocate or of the trustee with his concurrence.[9] Action of reduction of patents may be brought by the Lord Advocate, or by a party having interest with his concurrence, which may be given only on just cause shewn.[10] In the case of *Melville* v. *Cummings* [11] it was left undecided whether the Lord Advocate's concurrence would in such case be conclusive on the question of title to sue.

SUBSECTION (3).—*Advocates.*

162. An advocate has no title to sue either his client or the agent who instructs him for fees.[12] But he may sue the agent for fees recovered from the client or from the opposite party, and not paid over to him;[13] and an advocate may sue for the recovery of a salary as a standing counsel.[14]

SUBSECTION (4).—*Trustees.*

163. Unless the truster has specified a quorum, a majority, as well as all the trustees, may sue an action.[15] In ordinary circumstances one of

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[1] Trusts (Scotland) Act, 1921 (11 & 12 Geo. V. c. 58), s. 26.
[2] Lunacy Act, 1857 (20 & 21 Vict. c. 71), s. 81.
[3] Patents and Designs Act, 1907 (7 Edw. VII. c. 29), s. 94 (3).
[4] 3 & 4 Geo. V. c. 20, s. 186.
[5] Court of Exchequer (Scotland) Act, 1856 (19 & 20 Vict. c. 56), s. 24; *Edinburgh Life Assurance Co.* v. *Lord Advocate*, 1910 S.C. (H.L.) 13; *Macleod's Judicial Factor* v. *Busfield*, 1914, 52 S.L.R. 13, 1914, 2 S.L.T. 268.
[6] *Duke of Northumberland* v. *Harris*, 1832, 10 S. 366; *Usher* v. *Magistrates of Edinburgh*, 1839, 1 D. 639.
[7] *Darby* v. *Love*, 1796, Mor. 7907.
[8] *Paterson* v. *Robson*, 1872, 11 M. 76.
[9] 3 & 4 Geo. V. c. 20, s. 186.
[10] Patents and Designs Act, 1907 (7 Edw. VII. c. 29), s. 94 (3); *Melville* v. *Cummings*, 1912 S.C. 1185.
[11] 1912 S.C. 1185.
[12] *Batchelor* v. *Pattison & Mackersy*, 1876, 3 R. 914.
[13] *Keay and Others* v. *V.B., W.S.*, 1837, 15 S. 748 (note); *Bell and Moncrieff* v. *Jameson*, 1848, 10 D. 1413; *Cullen* v. *Buchanan*, 1862, 24 D. 1132.
[14] *Mackenzie* v. *Town of Burntisland*, 1728, Mor. 11421.
[15] *M'Culloch* v. *Wallace*, 1846, 9 D. 32; *Blisset's Trs.* v. *Hope's Trs.*, 1854, 16 D. 482.

two trustees has no title to sue an action.[1] One trustee may, however, raise an action for his own exoneration,[2] or sue his co-trustees for repayment to the estate of money illegally lent and lost,[3] and a minority has a title to interdict a majority of trustees from carrying into effect a resolution obtained by unfair means and concealment.[4]

Where an action is brought by or against trustees they must be named and designed in the summons. "The Trustees of A.B.," without any specification of individual names and designations, is not a *nomen juris* under which parties can sue or defend or use diligence.[5]

Subsection (5).—*Heirs.*

164. Since a personal right now vests in the heir without service,[6] and the real or feudal right can be acquired without delay by recording the appropriate deed, questions as to the heir's title to sue, which formerly frequently arose, are seldom met with. There are, however, certain cases where the heir's title must be completed in order to give him a good title. Thus where infeftment is necessary, as in actions of removing of persons holding from the heir's predecessor,[7] or reduction of infeftments of a former proprietor by an heir of provision under previous investitures,[8] his title must be complete, although probably it is sufficient that this is done prior to decree.[9]

165. An heir at law has a good title to reduce the will of a deceased person,[10] provided that his right as heir in the event of the deed being set aside is indefeasible.[11] Where money was improperly paid by trustees the heirs *ab intestato* of the testator were held to have a good title to sue the parties to whom the money had been paid for repetition of the sum to the trustees, the latter also being called as defenders.[12]

Subsection (6).—*Executors.*

166. As executors hold the estate *pro indiviso* they must all concur in suing an action with regard to the estate.[13] But if any refuse to accept

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[1] *Neilson* v. *Mossend Iron Co.*, 1885, 12 R. 499; *Campbell* v. *Campbell*, 1894, 1 S.L.T. 563.
[2] *Taylor* v. *Noble*, 1836, 14 S. 817; *Blair's Trs.* v. *Blair*, 1863, 2 M. 284.
[3] *Ross* v. *Allan's Trs.*, 1850, 13 D. 44.
[4] *Reid* v. *Maxwell*, 1852, 14 D. 449; *Wyse* v. *Abbott*, 1881, 8 R. 983.
[5] *Bell* v. *Trotter's Trs.*, 1841, 3 D. 380.
[6] Conveyancing (Scotland) Act, 1874 (37 & 38 Vict. c. 94), s. 9.
[7] *Paton* v. *Macintosh*, 1757, Mor. 5273; *Sutherland* v. *Graham*, 1759, Mor. 5276; *Grahame* v. *Grahame*, 1779, Mor. 3186; *Campbell* v. *M'Kellar*, 1808, Mor. *voce* Removing, App. No. 5; *Scott* v. *Fisher*, 1832, 10 S. 284; *Mackenzie* v. *Gillanders*, 1853, 16 D. 158.
[8] *Cochrane* v. *Ramsay*, 1828, 6 S. 751; 1830, 4 W. & S. 128; *Ruther,ord* v. *Nisbet's Trs.*, 1830, 9 S. 3, Lord Moncrieff at p. 6.
[9] *Mackintosh* v. *Munro*, 1854, 17 D. 99. See also *Walker* v. *Hendry*, 1925 S.C. 855.
[10] *Gilchrist* v. *Morrison*, 1891, 18 R. 599.
[11] *Wyllie* v. *M'Bride*, 1890, 18 R. 218.
[12] *Armour* v. *Glasgow Royal Infirmary*, 1909 S.C. 916.
[13] Stair iii. 8, 59; Ersk. Inst. iii. 9, 40; *Lag*, 1634, Mor. 14689; *Inglis* v. *Mirrie*, 1738, Mor. 16115.

office,[1] or to concur,[2] or are called as defenders [3] their consent is dispensed with.

An executor-nominate or dative has a title to sue before obtaining confirmation, it being only necessary to confirm before extract.[4]

A majority of executors can compromise a case so as to prevent the minority from opening it up and pursuing it, at any rate in the absence of averments of unfairness on the part of the majority.[5]

167. An executor has no title to sue for damages in respect of the death of the person whom he represents,[6] unless a claim had been intimated by the deceased prior to his death.[7] Where action was raised during the deceased's lifetime his executor may be sisted in his place to carry on the action,[8] but not where his only interest is with regard to expenses and not with regard to the merits of the action.[9] An executor has no title to raise an action of divorce or declarator of marriage in the name of a deceased person whom he represents.[10] But he is entitled to be sisted in order to defend a judgment pronounced in favour of the deceased which has been reclaimed against,[11] or to pursue an alternative conclusion for damages for breach of promise of marriage.[12]

Where an executor refuses to sue, the beneficiaries may compel him to give the use of his name and prosecute the action themselves, giving the executor an indemnity for expenses.[13]

Subsection (7).—*Beneficiaries.*

168. A general legatee or beneficiary has no title to sue a debtor of the testator.[14] The title to do so is in the deceased's trustees or executors. A trustee may, however, be compelled to give the use of his name, on security being found by the beneficiaries for expenses, or to assign his claim against the defender.[15] A beneficiary may sue the debtor of a

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[1] *M'Target* v. *Monteith*, 1829, 7 S. 591.

[2] *Rogerson* v. *Barker*, 1833, 11 S. 563; *Torrance* v. *Bryson*, 1841, 4 D. 71.

[3] *M'Target* v. *Monteith*, *supra*; *Torrance* v. *Bryson*, *supra*; *Ballantyne* v. *Ballantyne*, 1899 (O.H.), 7 S.L.T. 3.

[4] M'Laren, Wills and Succession, ii. 878; *Fyffe* v. *Ferguson*, 1842, 4 D. 1482; *Malcolm* v. *Dick*, 1866, 5 M. 18; *Mackay* v. *Mackay*, 1914 S.C. 200.

[5] *Scott* v. *Craig's Representatives*, 1897, 24 R. 462.

[6] *Bern's Exr.* v. *Montrose Asylum*, 1893, 20 R. 859.

[7] *Leigh's Exrx.* v. *Caledonian Rly. Co.*, 1913 S.C. 838.

[8] *Neilson* v. *Rodger*, 1853, 16 D. 325; *Darling* v. *Gray & Sons*, 1892, 19 R. (H.L.) 31.

[9] *Martin's Exrx.* v. *M'Ghee*, 1914 S.C. 628.

[10] Fraser on Husband and Wife, pp. 1145 and 1241.

[11] *Ritchie* v. *Ritchie*, 1874, 1 R. 826.

[12] *Green or Borthwick* v. *Borthwick*, 1896, 24 R. 211.

[13] *Blair* v. *Stirling*, 1894, 1 S.L.T. 599; *Morrison* v. *Morrison's Exrx.*, 1912 S.C. 892.

[14] *Peock* v. *Glasgow*, 1824, 2 S. 769 (N.E. 639); *Young* v. *Ramage*, 1838, 16 S. 572, Lord Corehouse, at p. 578; *Hinton* v. *Connell's Trs.*, 1887, 10 R. 1110; *Hannah* v. *Sharp*, 1901 (O.H.), 9 S.L.T. 333; *Crammond* v. *Gordon*, 1902 (O.H.), 10 S.L.T. 12; *Morrison* v. *Morrison's Exrx.*, 1912 S.C. 892.

[15] *Brown's Trs.* v. *Brown*, 1888, 15 R. 581; *Raes* v. *Meek*, 1889, 16 R. (H.L.) 31; *Henderson* v. *Robb*, 1889, 16 R. 341, Lord Shand at p. 345.

deceased person where he calls the trustees as defender, averring that the defenders are in league to enable the debtor to avoid his obligation.[1] A special legatee has a title to sue the holder of the subject of his legacy, provided he makes the executor a party to the action.[2]

169. A beneficiary has a title to sue trustees for a breach of trust, and it is not necessary that all the trustees should be called as defenders.[3] If there is more than one beneficiary, the action may be at the instance of only one of them, but as the action would be *res judicata* against the other beneficiaries, it is proper that intimation should be made to them in order that they may sist themselves as pursuers if so advised.[4] A beneficiary under an earlier settlement has a good title to sue a reduction of a later settlement, even where his interest under the later deed is as great as under the earlier.[5] But where beneficiaries are to be selected by the executors from a class, no member of the class has a title to sue.[6]

Subsection (8).—*Corporate Bodies.*

170. Corporate bodies can sue and be sued under their corporate name. A company must, however, conform in its constitution to the provisions of the Companies Acts, or its own charter, and must not be illegal in its objects ; otherwise it is not a legal *persona*, and has no title to sue.[7] The title to sue is in the corporation, and not in its individual members, and the decision of the question whether or not to sue or defend rests with the majority of the members.[8] The majority alone has a title to sue in respect of an act which, although not illegal or *ultra vires*, was done irregularly and without their approval ; and the action must be raised in the name of the corporation or company.[9] But a single member, either for himself alone or on behalf of others, may sue the incorporation and its directors to prevent them from doing an illegal or criminal or *ultra vires* act.[10] And he may sue a director for fraudulent mismanagement, and does not require to call the company, the other directors, or shareholders.[11]

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[1] *Watt* v. *Roger's Trs.*, 1890, 17 R. 1201.

[2] *Bell* v. *Willison*, 1831, 9 S. 266 ; *Young* v. *Ramage*, 1838, 16 S. 572, Lord Corehouse at p. 578 ; *Lyle* v. *Falconer*, 1842, 5 D. 236.

[3] *Croskery* v. *Gilmour's Trs.*, 1890, 17 R. 697.

[4] *Allen* v. *M'Combie's Trs.*, 1909 S.C. 710.

[5] *Duncan* v. *Duncan*, 1892, 20 R. 200.

[6] *M'Donald* v. *M'Coll*, 1890, 17 R. 951 ; *Martins* v. *MacDougall's Trs.*, 1885, 13 R. 274 ; *Addison* v. *Whyte*, 1870, 8 M. 909.

[7] *Edinburgh and District Aerated Water Manufacturers Defence Association* v. *Jenkinson & Co.*, 1903, 5 F. 1159.

[8] *Lee* v. *Crawford*, 1890, 17 R. 1094.

[9] *Orr* v. *Glasgow, Airdrie and Monklands Junction Rly. Co.*, 1860, 3 Macq. 799 ; *Fraser* v. *City of Glasgow Bank*, 1879, 6 R. 1259 ; *Brown* v. *Stewart*, 1898, 1 F. 316 ; *Young* v. *Brownlie & Co.*, 1911 S.C. 677.

[10] *Rixon* v. *Edinburgh Northern Tramways Co.*, 1889, 16 R. 653, 18 R. 264, Lord Kincairney at p. 271, 20 R. (H.L.) 53 ; *Hannay* v. *Muir*, 1898, 1 F. 306, Lord Low at p. 310.

[11] *Leslie's Representatives* v. *Lumsden*, 1851, 14 D. 213 ; *Tulloch* v. *Davidson*, 1858, 20 D. 1045, 1860, 22 D. (H.L.) 7.

171. An incorporate body has no title to sue for *solatium*, but it has a title to sue where its credit is attacked. Thus, a bank,[1] a society of solicitors,[2] and an incorporation of fleshers [3] were each held entitled to sue an action of damages for slander. Similarly a corporation can be sued for a slander uttered by one of its servants in the course of his employment and within the scope of his authority.[4] A debenture-holder has been held entitled to sue the promoter of a company for damages on the ground that he was induced by the defender's false and fraudulent representations to advance money to the company.[5] A shareholder who has been induced to take shares by the false and fraudulent statements of the directors has a title to sue them for damages,[6] or to bring an action against the company for removal of his name from the register of shareholders and for repayment of the price of the shares which he had been induced to apply for by false and fraudulent statements in the prospectus.[7]

172. A limited company cannot sue for damages in respect of a contract entered into before it came into existence.[8]

Subsection (9).—*Unincorporate Bodies.*

173. As a general rule an unincorporated body cannot sue in its own name alone, but requires to sue and be sued in the names of individual members. The name of the company, society, or association should be prefixed or added to the names of the individual pursuers. It is not necessary that all the members or partners should be included in the instance ; a majority is enough.[9] The office-bearers of a society who sue, along with the society, either after being specially authorised at a meeting of the society or in conjunction with a sufficient number of members to shew that they represent the society, have a good title to sue.[10]

174. A registered trade union may sue and be sued in the name of trustees or any other officer who may be authorised by its rules to do so, touching the property, right, or claim to property of the union.[11] As regards any other matter it can sue or be sued in its registered name.[12]

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[1] *North of Scotland Banking Co.* v. *Duncan*, 1857, 19 D. 881 ; *British Legal Life Assurance and Loan Co.* v. *Pearl Life Assurance Co.*, 1887, 14 R. 818.

[2] *Solicitors of Edinburgh* v. *Robertson*, 1781, Mor. 13935.

[3] *Dumfries Fleshers* v. *Rankine*, 10th Dec. 1816, F.C.

[4] *Finburgh* v. *Moss' Empires*, 1908 S.C. 928. But cf. *Riddell* v. *Glasgow Corporation*, 1911 S.C. (H.L.), 35 ; *Mandelston* v. *North British Rly. Co.*, 1917 S.C. 442.

[5] *Dunnett* v. *Mitchell*, 1885, 12 R. 400.

[6] *Davidson* v. *Tulloch*, 1860, 3 Macq. 783.

[7] *Mair* v. *Rio Grande Rubber Estates*, 1913 S.C. (H.L.) 74.

[8] *Tinnevelley Sugar Refining Co.* v. *Mirrlees, Watson & Yaryan Co.*, 1894, 21 R. 1009.

[9] *Shotts Iron Co.* v. *Hopkirk*, 1828, 6 S. 399 ; *Sclater* v. *Clyne*, 1831, 9 S. 248 ; *Balfour* v. *Kerr*, 1856, 18 D. 619.

[10] *Renton Football Club* v. *M'Dowall*, 1891, 18 R. 670 ; *Pagan and Osborne* v. *Haig*, 1910 S.C. 341.

[11] Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 9 ; *Gough* v. *Macdonald*, 1900, 2 F. 899.

[12] *Taff Vale Rly. Co.* v. *Amalgamated Society of Rly. Servants*, [1901] A.C. 426.

An action cannot be maintained against a trade union, or against any members or officials thereof on behalf of themselves and the other members of the trade union in respect of any tortious act alleged to have been committed by or on behalf of the trade union ;[1] the liability of trustees of a trade union to be sued under s. 9 of the Act of 1871 is not affected except in respect of a tortious act committed by or on behalf of the union in contemplation or in furtherance of a trade dispute.[2]

An unregistered trade union requires to sue and be sued in the same way as any other unincorporated voluntary association.[3]

175. The trustees of a registered friendly society, or branch, or any other officers authorised by the rules thereof, may bring or defend any action or other legal proceeding in any Court touching or concerning any property, right, or claim of the society or branch, and may sue and be sued in their proper names, without other description than the title of their office.[4] In legal proceedings under the Friendly Societies Act, 1896, by a member or person claiming through a member, a registered society or branch may also be sued in the name of any officer or person who receives contributions or issues policies on behalf of the society within the jurisdiction of the Court in which the legal proceeding is brought with the addition of the words " on behalf of the society or branch " (naming the same).[5]

176. The General Assembly of the Church of Scotland may sue and be sued by means of the Moderator and the officials as representing the Assembly.[6] A majority of a presbytery may sue or defend, but must also state their individual names as pursuers and defenders, but they cannot bind the minority in the matter of expenses.[7] A presbytery may also sue by means of a committee or officials specially appointed and authorised.[8] A kirk-session sues and is sued in the name of the minister and the individual members, as such minister and members and as individuals.[9] The majority of the members of the committee of management of a *quoad sacra* church may sue in the names of the committee, provided that the majority was authorised at a meeting called for the purpose ; and intimation of the meeting from the pulpit has been held sufficient notice.[10] Heritors may sue and be sued in their own name, as " Heritors of the Parish of ," and the name of their clerk.[11]

177. The General Assembly or Supreme Court of a voluntary church may sue in its own name along with its officials,[12] or by a committee

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[1] Trade Disputes Act, 1906 (6 Edw. VII. c. 47), s. 4 (1). [2] *Ibid.*, s. 4 (2).
[3] *Wilson* v. *Scottish Typographical Association*, 1911, 1 S.L.T. 253.
[4] Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 94 (1). [5] *Ibid.*, s. 94 (2).
[6] *Cruickshank* v. *Gordon*, 1843, 5 D. 909.
[7] *Buist* v. *Taylor*, 1856, 18 D. 596.
[8] *Presbytery of Deer* v. *Heritors of Pitsligo*, 1876, 3 R. 975.
[9] *School Board of Glasgow* v. *Kirk-Session of Anderston*, 1910 S.C. 195.
[10] *Darling* v. *Darling*, 1898, 25 R. 747.
[11] *Bathgate Heritors* v. *Russell*, 1908 (O.H.), 16 S.L.T. 210.
[12] *United Free Church of Scotland* v. *M'Iver*, 1902, 4 F. 1117 ; *General Assembly of the Free Church of Scotland* v. *Johnston*, 1905, 7 F. 517 ; *United Free Church of Scotland* v. *Black*, 1909, S.C. 25.

appointed or authorised to sue,[1] or by a duly authorised official.[2] It may be sued in its own name, and those of the Moderator and officials.[3] Where a presbytery of a voluntary church was called for its interest, it was held sufficient to cite its office-bearers ;[4] but if such presbytery were called as a proper defender, or if it is the pursuer, it is thought that the individual members would require to be mentioned, except where authority has been given to a committee or individual, as in the case of a presbytery of the Church of Scotland. A congregation of a voluntary church may be sued by its office-bearers.[5]

Subsection (10).—*Mercantile Firms.*

(i) *Proper Firm.*

178. A proper firm is one whose firm name consists of personal names. Such a firm may sue and be sued in the firm name, without the name of any individual partner being added.[6] A partner in such a firm has an implied mandate to sue in the name of the firm for a firm debt, and may do so notwithstanding that another member of the firm puts in a disclaimer.[7] Where the partnership is dissolved by death, the surviving partners may sue in their own names for the firm's debts.[8] Where a partnership is dissolved and reconstituted, there must be some form of assignation by the old to the new firm to entitle the latter to sue for the accounts of the former.[9]

A single individual who trades under the name of a proper firm may sue either in the firm name or as an individual.[10]

(ii) *Descriptive Firm.*

179. A descriptive firm is one which trades by a descriptive name, such as " The Shotts Iron Co." Where such a company or firm sues or is sued there should be added to the descriptive name the names of three partners, if there are so many, or if there are less than three partners, of all the partners.[11] A manager of such a firm has no title to sue or be sued in the name of the firm.[12] Where the pursuer in an

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[1] *General Assembly of the General Baptist Churches* v. *Taylor*, 1841, 3 D. 1030 ; *Bannatyne* v. *United Free Church of Scotland*, 1902, 4 F. 1083.

[2] *Norfor* v. *Aberdeenshire Education Authority*, 1923 S.C. 881. (Session Papers.)

[3] *Skerret v. Oliver*, 1896, 23 R. 468, Lord Kincairney at p. 475.

[4] *Ibid.*

[5] *Bridge* v. *South Portland Street Synagogue*, 1907 S.C. 1351.

[6] *Walker, Fraser and Steele* v. *Fraser's Trs.*, 1910 S.C. 222.

[7] *J. & W. Kinnes* v. *Adam & Sons*, 1882, 9 R. 698, Lord M'Laren at p. 700.

[8] *Nicoll* v. *Reid*, 1877, 5 R. 137.

[9] *A. & A. Campbell* v. *Campbell's Exrs.*, 1910, 47 S.L.R. 837 ; 2 S.L.T. 240, L.P. Dunedin.

[10] *Booth* v. *Commercial Banking Co.*, 1823, 2 S. 311 (N.E. 273) ; *Mills* v. *Hamilton*, 1830, 9 S. 111 ; *Rose* v. *Moore & Son*, 1833, 11 S. 344 ; *Young* v. *Livingston*, 1860, 22 D. 983.

[11] *Culcreuch Cotton Co.* v. *Mathie*, 1822, 2 S. 47 (N.E. 41). *Antermony Coal Co.* v. *Wingate & Co.*, 1866, 4 M. 1017, L.P. Colonsay, pp. 1018, 1019 ; *North British Rly. Co.* v. *Budhill Coal and Sandstone Co.*, 1909 S.C. 277. (Session Papers.)

[12] *Robertson* v. *Anderson*, 1841, 3 D. 986 ; *M'Millan* v. *M'Culloch*, 1842, 4 D. 492.

action against a descriptive firm does not know the names of the individual partners, the Court will sustain the action against the firm alone, and give the pursuer the means, as by diligence, to recover documents instructing who the partners are, or to obtain the names of the partners.[1] If partners sue for a firm debt the name of the firm must be included in the instance.[2]

Subsection (11).—*Joint Adventure.*

180. A joint adventure differs from a partnership in respect that, unlike the latter, which is a separate legal *persona* and subsists as such for the purpose of winding up, a joint adventure, when completed, is resolved into its elements, and each joint adventurer may maintain his own interests in the common fund by action without the co-operation of the others. Accordingly a minority of joint adventurers can sue one who had acted as treasurer for count, reckoning, and payment of their shares.[3] One of several owners of a ship may call on the ship's husband to account for rebates or commissions paid by him, although the others object ;[4] and one joint adventurer may sue the others for his share of profits.[5] The solvent partner of a joint adventure has been held entitled to recover and discharge debts due to the joint adventure.[6]

Subsection (12).—*Landlord and Tenant.*

181. A landlord whose title has not been completed by infeftment when he brings an action of removing may make his title good by infeftment before decree.[7] Where the landlord is infeft his title cannot be challenged by his tenant.[8] A liferent tenant has a title to pursue alone an action of removing,[9] even where the lease was granted by the liferenter and fiar jointly.[10] But a fiar is not entitled to remove a tenant without concurrence of the liferenter.[11] A house factor has no title to sue a removing without special authority.[12] A landlord in possession when the date arrives for payment of rent has a good title to sue for removal and for payment of the rent, although he may be liable to account for the rent recovered to the representatives of his predecessor.[13]

182. Sub-tenants from a principal lessee cannot challenge their author's title to sue an action of removing.[14]

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[1] *Mitchell* v. *Grangemouth Coal Co.*, 1894, 2 S.L.T. 104.
[2] *Plotzker* v. *Lucas*, 1907 S.C. 315.
[3] *Pyper* v. *Christie*, 1878, 6 R. 143.
[4] *Manners* v. *Raeburn and Verel*, 1884, 11 R. 899.
[5] *Shaw* v. *Gibb's Trs.*, 1893, 20 R. 718.
[6] *Thom* v. *North British Banking Co.*, 1850, 13 D. 134.
[7] *Mackintosh* v. *Munro*, 1854, 17 D. 99 ; *Walker* v. *Hendry*, 1925 S.C. 855.
[8] *Chisholm* v. *Macdonald*, 27th Feb. 1800, F.C. ; *Stewart* v. *Burns*, 1802, Hume's Dec. 568.
[9] *Wilson* v. *Wilson*, 1859, 21 D. 309.
[10] *M'Christie* v. *Kea or Fisher*, 1825, 4 S. 11.
[11] *Buchanan* v. *Yuille*, 1831, 9 S. 843.
[12] *Slowey* v. *Robertson and Moir*, 1865, 4 M. 1, Lord Mackenzie at p. 3.
[13] *Lennox* v. *Reid*, 1893, 21 R. 77.
[14] *Dunlop & Co.* v. *Meiklem*, 1876, 4 R. 11.

183. A *pro indiviso* proprietor is not entitled to pursue an action of removing unless he have the concurrence of the other proprietors.[1] It is, however, still an open question whether he can sue for his share of the rents without the concurrence of the other *pro indiviso* proprietors.[2]

184. A tenant has no title to sue an action against feuars of the proprietor regarding property let by the proprietor to the tenant;[3] nor has the heir of a tenant a title to object to an assignation excluded by the lease, the title being in the landlord alone.[4]

185. The wife and children of a tenant have no title to sue for damages against the landlord in respect of the insanitary condition of the house, so far at least as founded on contract.[5] The tenant himself, however, has a title to sue in respect of actual loss which he has incurred owing to illness of his wife and children caused by the insanitary condition of the house.[6] But where the action is founded on delict and not on breach of contract, a person who is not a party to the lease may have a title to sue the landlord. Thus a domestic servant employed by a tenant was held to have a good title to sue a landlord for negligence in respect of injuries sustained through the fall of a ceiling.[7]

186. A landlord[8] and a tenant[9] have each a title to sue to put a stop to a nuisance created by a third party; and, where both are affected, they may sue in the same action.[10] A landlord has also a title to sue for interdict where complaint is made to him by his tenant of a nuisance, and the letting value of his property is thereby affected.[11]

Subsection (13).—*Liferenter and Fiar.*

187. A liferenter may sue and be sued in questions relating to the right of ownership and the mode of its enjoyment,[12] but, unless in exceptional circumstances, the judgment will not be *res judicata* against the fiar.[13] In actions of removing, where the lease was granted by the common author of a liferenter and fiar, or by the latter parties together, the concurrence of both liferenter and fiar is necessary.[14] Where a farm was disponed in liferent, but under the declaration that if certain parks

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[1] *Grozier* v. *Downie*, 1871, 9 M. 826.
[2] *Schaw* v. *Black*, 1889, 16 R. 336.
[3] *Baird & Co.* v. *Feuars of Kilsyth*, 1878, 6 R. 116.
[4] *Hay and Wood*, 8th Dec. 1801, F.C.; *M'Coag v. M'Sporan*, 1803, Hume's Dec. 813.
[5] *Cameron* v. *Young*, 1907 S.C. 475, 1908 S.C. (H.L.) 7.
[6] *Soutar* v. *Mulhern*, 1907 S.C. 723.
[7] *Kennedy* v. *Bruce*, 1907 S.C. 845.
[8] *Fleming* v. *Ure*, 1750, Mor. 13159; *Fraser's Trs.* v. *Cran*, 1877, 4 R. 794, 5 R. 290, 6 R. 451.
[9] *Fleming* v. *Gemmill*, 1908 S.C. 340.
[10] *Jolly* v. *Brown*, 1828, 6 S. 872; *Young* v. *Cunningham*, 1830, 8 S. 959.
[11] *M'Ewen* v. *Steedman & M'Alister*, 1912 S.C. 156; *Maguire* v. *Charles M'Neil, Ltd.*, 1922 S.C. 174.
[12] *Hardie* v. *Magistrates of Port-Glasgow*, 1864, 2 M. 746; *Wemyss* v. *Stuart*, 1633, Mor. 2197.
[13] Rankine on Land Ownership, 4th ed., p. 735; *Denovan* v. *Johnstone*, 1832, 10 S. 206.
[14] *Buchanan* v. *Yuille*, 1831, 9 S. 843.

were let at the time of the disponer's death the rents should fall to the fiar, who should meantime pay an annuity to the liferenter until the latter should obtain the natural possession of the park, it was held that the fiar, without concurrence of the liferenter, was entitled to sue an action of sequestration for rent, although he could not remove the tenant without the concurrence of the liferenter.[1]

Subsection (14).—*Assignee.*

188. An assignee may sue in his own name or in that of the cedent.[2] Where the action is raised in name of the cedent, any objection to the title raised by the defender may be cured by the assignee sisting himself,[3] which he may do without consent of the defender.[4] An assignee has no better title to sue than his author had, and is subject to all the pleas and exceptions pleadable against the cedent.[5] The extent of his title depends upon the terms of the assignation and the powers of the cedent.[6]

Where a pursuer's title is *ab initio* defective, it cannot be made good by a subsequent assignation.[7] But where there is a good title, which only requires formally to be made absolute, an assignation *pendente processu* will make the pursuer's title good.[8]

189. A claim for damages and *solatium ex delicto* is assignable, and the assignee may sue in his own name.[9]

Where *delectus personæ* enters into a contract it is not assignable, and an assignee has, accordingly, no title to sue.[10]

190. An assignation is valid as against the executor of the cedent, although the latter has died before intimation of the assignation.[11]

Special assignations and dispositions by a deceased person give a good title to sue, notwithstanding the interposition of trustees and executors.[12]

191. A party who has granted an assignation and then raises an action has a good title to carry it on if he obtains a retrocession *pendente processu*;[13] and where a contract had been assigned by one who

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[1] *Zuill* v. *Buchanan*, 1833, 11 S. 682.

[2] *Fraser* v. *Duguid*, 1838, 16 S. 1130; *Methven Simpson, Ltd.* v. *Jones*, 1910, 2 S.L.T. 14; *Traill & Sons* v. *Actieselskabet Dalbeattie, Ltd.*, 1904, 6 F. 798.

[3] *Fraser* v. *Duguid*, 1838, 16 S. 1130.

[4] *Ibid.*; *Mavor* v. *Governors of Aberdeen Educational Trust*, 1902, 10 S.L.T. 156.

[5] *Scottish Widows' Fund* v. *Buist*, 1876, 3 R. 1078; *Simpson & Co.* v. *Thomson & Co.*, 1877, 5 R. (H.L.) 40; *Edinburgh United Breweries* v. *Nicolson's Tr.*, 1893, 20 R. 581.

[6] *Glen* v. *Glen*, 1826, 5 S. 11 (N.E. 10); *Smith & Co.* v. *Smyth*, 1889, 16 R. 392; *Siddons* v. *Ryder*, 1825, 3 S. 576 (N.E. 397); *Rose* v. *Stevenson*, 1888, 15 R. 336.

[7] *Symington* v. *Campbell*, 1894, 21 R. 434.

[8] *Doughty Shipping Co.* v. *North British Rly. Co.*, 1909, 1 S.L.T. 267; *District Committee of Middle Ward of Lanark* v. *Marshall*, 1896, 24 R. 139.

[9] *Traill & Son* v. *Actieselskabet Dalbeattie, Ltd.*, 1904, 6 F. 798.

[10] *Grierson, Oldham & Co.* v. *Forbes, Maxwell & Co.*, 1895, 22 R. 812; *International Fibre Syndicate* v. *Dawson*, 1901, 3 F. (H.L.) 32; *Rodger* v. *Herbertson*, 1909 S.C. 256; *Cole* v. *Handasyde & Co.*, 1910 S.C. 68; *Stevenson & Sons* v. *Maule & Son*, 1920 S.C. 335.

[11] *Brownlee* v. *Robb*, 1907 S.C. 1302.

[12] *Bell* v. *Willison*, 1831, 9 S. 266; *Young v. Ramage*, 1838, 16 S. 572, Lord Corehouse at p. 578; *Lyle* v. *Falconer*, 1842, 5 D. 236; *Gray* v. *Cockburn*, 1711, Mor. 8062.

[13] *Barry* v. *Geddes*, 1829, 8 S. 53; *Fraser* v. *Duguid*, 1838, 16 S. 1130.

was himself an assignee from one of the original parties to the contract, the first assignee was held entitled to sue an action for reduction of the original assignation after an action had been brought against him by the second assignee for rescission of the second assignation, although decree in the latter action was not pronounced until after the former action had been raised.[1]

Subsection (15).—*Cautioners.*

192. A cautioner who has made payment of the debt in full is entitled to an assignation of the debt and diligence and any collateral securities, and may then sue the principal debtor.[2] He has also a title to sue his co-cautioners to the extent of their *pro rata* shares.[3] Even before making payment to the creditor the cautioner has a title to sue the principal debtor (1) where the debtor was expressly bound to deliver to the cautioner his obligation cancelled at the date when payment of the debt was due ; (2) where the principal debtor is *vergens ad inopiam*. If the obligation is conditional and may be long pendent the cautioner has a title to adjudge in security, subject to the qualification that no execution shall be used upon the decree until distress.[4] Where a letter of guarantee was to remain in operation until recalled, the cautioner, having recalled the guarantee, was held entitled to sue the principal debtor for relief.[5]

Subsection (16).—*Agent and Principal.*

193. An agent who contracts as principal, or as agent for an undisclosed principal, has a title to sue in his own name. The principal may, however, come forward and disclose himself and sue the other party himself. If he does so he will be affected by any counter-claims that might have been pleaded against the agent.[6] Once an election has been made, the agent cannot sue after the principal has sued, and *vice versa*.[7]

194. Where there is a disclosed principal, the agent in the ordinary case has no title to sue on the contract, the principal being the only person entitled to do so. But where there is a clause in favour of the agent, the agent is entitled to sue upon that clause.[8] And if the agent of a disclosed principal is liable to relieve his principal of any obligation under the contract, he has a title to sue.[9]

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[1] *Westville Shipping Co.* v. *Abram Steamship Co.*, 1922 S.C. 571, 1923 S.C. (H.L.) 68.
[2] *Ewart* v. *Latta*, 1865, 4 Macq. 983.
[3] *Anderson* v. *Dayton*, 1884, 21 S.L.R. 787 ; *Buchanan* v. *Main*, 1900, 3 F. 215.
[4] Ersk. Inst. iii. 3, 65.
[5] *Doig* v. *Lawrie*, 1903, 5 F. 295.
[6] *Bennett* v. *Inveresk Paper Co.*, 1891, 18 R. 975, Lord M'Laren at p. 983.
[7] *Thomson* v. *Davenport*, 1829, 2 Smith's Leading Cases 12th ed., 355, 9 B. & C. 78.
[8] *Fisher and Hepburn* v. *Syme and Stewart*, 1827, 6 S. 216 ; *Bonar* v. *Liddell*, 1841, 3 D. 830 ; *Levy & Co.* v. *Thomsons*, 1883, 10 R. 1134.
[9] *Milne* v. *Ritchie*, 1882, 10 R. 365 ; *Macdonald & Fraser* v. *Henderson*, 1882, 10 R. 95.

195. A shipmaster has a title to sue under a contract, as representing the owners in a foreign country.[1]

A limited company has no title to sue in respect of a contract said to have been entered into by an agent on its behalf before it came into existence.[2]

196. Where a general mandate to sue is granted to one on behalf of another, the question whether it entitles the mandatary to sue particular actions, or to follow them to the Court of appeal, depends upon the terms of the mandate, which should accordingly be explicit. A mandate to sue in the Sheriff Court has been held not to apply to the Court of Session,[3] and a mandate to raise objections before the Licensing Court does not entitle the mandatary to take an appeal to the Appeal Court.[4]

Subsection (17).—*Factor.*

197. A private factor and commissioner requires express authority in writing to pursue an action of removing.[5] But where a factor has power, in the absence of the landlord, to grant leases, as the tenant cannot challenge the title of his lessor, the factor would appear to have a title to sue a removing.[6] Where a farm-bailiff sold a bullock on behalf of the proprietor and accounted to the proprietor for the price, he was held to have a good title to sue the purchaser for the unpaid price after he had left his employment.[7]

Subsection (18).—*Joint or Pro Indiviso Proprietors and Part Owners.*

198. As a general rule all the *pro indiviso* proprietors must concur in an action in respect of heritable property so owned.[8] Accordingly, one *pro indiviso* proprietor cannot remove[9] or sequestrate[10] tenants But a single *pro indiviso* proprietor has a title to protect his property from encroachments,[11] or nuisance,[12] or to eject an intruder who has no title.[13] And he may sue for division of the property.[14]

Similarly one of several parties having a joint right in a patent, while he has a title to protect the patent from injury, has no title to sue in

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[1] *Larsen* v. *Ireland & Son*, 1892, 20 R. 228.
[2] *Tinnevelley Sugar Refining Co.* v. *Mirrlees, Watson & Yaryan Co.*, 1894, 21 R. 1009.
[3] *Bonny* v. *Gillies*, 1829, 8 S. 13.
[4] *Goodall* v. *Bilsland*, 1909 S.C. 1152.
[5] *York Building Co.* v. *Carnegie*, 1764, Mor. 4054; *Slowey* v. *Robertson and Moir*, 1865, 4 M. 1, Lord Mackenzie at p. 3.
[6] *Grozier* v. *Downie*, 1871, 9 M. 826.
[7] *Graham* v. *Tait*, 1885, 12 R. 588.
[8] *Lawson* v. *Leith and Newcastle Steam Packet Co.*, 1850, 13 D. 175, Lord Moncrieff at p. 180; *Millar* v. *Cathcart*, 1861, 23 D. 743, Lord Deas at p. 746.
[9] *Grozier* v. *Downie*, 1871, 9 M. 826.
[10] *Stewart* v. *Wand*, 1842, 4 D. 622.
[11] *Warrand* v. *Watson*, 1905, 8 F. 253.
[12] *M'Culloch* v. *Wallace*, 1846, 9 D. 32.
[13] *Lade* v. *Largs Baking Co.*, 1863, 2 M. 17, Lord Deas at p. 21.
[14] *Grant* v. *Heriot's Trust*, 1906, 8 F. 647, L.P. Dunedin at p. 658.

respect of an agreement relating to the patent without the concurrence of the other parties.[1]

199. A part owner is not a joint or *pro indiviso* proprietor. He has, accordingly, a good title to maintain an action for his own interest. Thus, the part owner of a ship has a title to sue for his share of the damage caused by the loss of the vessel in a collision.[2] But he has no title to sue in respect of an agreement entered into with all the part owners.[3]

Subsection (19).—*Persons with community of Interest.*

200. Where several unconnected persons have been aggrieved by the same act of the defender, or have a joint interest in the matter libelled, one action in their joint names is competent, but such actions are limited to cases of these two descriptions.[4] Thus, where two persons suffer personal injury by the same act of negligence or delict,[5] or are slandered by the same remark,[6] they may sue in one action, but the summons must contain separate conclusions for damages, and each pursuer must take a separate issue.[7] Where a father sues as administrator-in-law for his pupil children for damages for personal injuries suffered by them, he must conclude for a separate sum for each child, and not for a lump sum.[8]

Where unconnected persons sue in a single action, and the action as laid is held in consequence to be incompetent, the summons may be amended by striking out the names of the persons who have no community of interest.[9]

Subsection (20).—*Members of the Public, Ratepayers, etc.*

201. Members of the public, or members of particular sections of the public, have in certain cases a right to sue actions as such. An action brought by a pursuer in his capacity as a member of the public is known as an *actio popularis*, and such action is available for the vindication or defence of a public right. Thus any member of the public has a title to sue for declarator of a public right of way,[10] a right of market,[11] a declarator that the navigation of a public navigable river should not be obstructed,[12] a declarator of common use and enjoyment by the public

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[1] *Detrick and Webster* v. *Laing's Patent Overhead Handstitch Sewing Machine Co.*, 1885, 12 R. 416, L.P. Inglis at p. 419.
[2] *Lawson* v. *Leith and Newcastle Steam Packet Co.*, 1850, 13 D. 175.
[3] *Scotland* v. *Walkinshaw*, 1830, 9 S. 25.
[4] *Killin* v. *Weir*, 1905, 7 F. 526, L.P. Dunedin at p. 527.
[5] *Revey* v. *Murdoch*, 1841, 3 D. 888; *Black* v. *Fraser*, 1900 (O.H.), 8 S.L.T. 225.
[6] *Harkes* v. *Mowat*, 1862, 24 D. 701; *Mitchell* v. *Grierson*, 1894, 21 R. 367.
[7] *Mitchell* v. *Grierson*, 1894, 21 R. 367; *Brims and Mackay* v. *Pattullo*, 1907 S.C. 1106.
[8] *Gray* v. *Caledonian Rly. Co.*, 1912 S.C. 339.
[9] *Paxton* v. *Brown*, 1908 S.C. 406; *Brown's Trs.* v. *Hay*, 1897, 24 R. 1108.
[10] *Torrie* v. *Duke of Atholl*, 1852, 1 Macq. 65.
[11] *Blackie* v. *Magistrates of Edinburgh*, 1886, 13 R. (H.L.) 78.
[12] *Colquhoun's Trs.* v. *Orr Ewing & Co.*, 1877, 4 R. 344.

of a piece of land,[1] for removal of a public danger,[2] or nuisance,[3] or to prevent the building of a bridge across a public street by proprietors on opposite sides of the street,[4] and the like.

Caution for expenses may be ordered,[5] but, if the pursuer who is seeking to vindicate a public right is *bona fide* representative of his class, the fact that he is poor will not be sufficient to induce the Court to ordain him to find caution.[6]

202. Members of the public, as ratepayers or electors, have a title to reduce the proceedings in local government elections on the ground of illegalities.[7] Individual ratepayers may also sue a declarator that assessments made upon them are illegal.[8] But they have no title to have funds, which have been improperly diverted, restored to the coffers of a town, or to interdict a payment out of the common good of a royal burgh, which is corporate property, subject only to Crown control.[9] A ratepayer may bring a petition under s. 67 of the Burgh Police (Scotland) Act, 1892, for correction of the burgh accounts, without averring prejudice to himself personally.[10]

A member of the public who is qualified to object to the granting of a licence has a title to sue a reduction of a licence illegally granted.[11]

Shipowners, who paid rates to a body of harbour trustees, were found to have a title as ratepayers, but not as rival traders, to interdict the trustees as owners of public ferries from using the ferry steamers as excursion steamers, on the ground that such use was *ultra vires*.[12]

Subsection (21).—*Joint Delinquents.*

203. Where one of several co-delinquents has had to pay under a joint and several decree, or where he has been sued alone, he has a right of relief against the others, at least where the delinquency involves no gross negligence or fraud.[13]

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[1] *Wallace-James* v. *Montgomerie & Co.*, 1899, 2 F. 107.

[2] *Fergusson* v. *Ferguson*, 1900, 38 S.L.R. 100.

[3] *Adam* v. *Alloa Commissioners*, 1874, 2 R. 143; *Ogston* v. *Aberdeen Tramways Co.*, 1896, 24 R. (H.L.) 8.

[4] *Donald & Sons* v. *Esslemont & Macintosh*, 1923 S.C. 122.

[5] *Jenkins* v. *Robertson*, 1869, 7 M. 739.

[6] *Potter* v. *Hamilton*, 1870, 8 M. 1064.

[7] *Duncan* v. *Crichton*, 1892, 19 R. 594; *Latham* v. *Glasgow Corporation*, 1921 S.C. 694; *Ross* v. *Buckie Magistrates* (O.H.), 1921, 2 S.L.T. 212; *Nicolson* v. *Magistrates of Wick*, 1922 S.C. 374; *Young* v. *Burgh of Darvel*, 1923 S.C. (H.L.) 1.

[8] *Cowan and Mackenzie* v. *Law*, 1872, 10 M. 578; *Wakefield* v. *Commissioners of Supply of Renfrew*, 1878, 6 R. 259; *Stirling County Council* v. *Magistrates of Falkirk*, 1912 S.C. 1281; *Farquhar and Gill* v. *Magistrates of Aberdeen*, 1912 S.C. 1294.

[9] *Conn* v. *Magistrates of Renfrew*, 1906, 8 F. 905.

[10] *Heddle* v. *Magistrates of Leith*, 1898, 25 R. 801.

[11] *Black* v. *Tennent*, 1899, 1 F. 423; *Bootland* v. *M'Farlane*, 1900, 2 F. 1014.

[12] *D. & J. Nicol* v. *Dundee Harbour Trs.*, 1915 S.C. (H.L.) 7.

[13] *Palmer* v. *Wick, etc. Steam Shipping Co.*, 1894, 21 R. (H.L.) 39, Lord Watson at pp. 43–6; *Ellerman Lines, Ltd.* v. *Clyde Navigation Trs.*, 1909 S.C. 690, L.P. Dunedin at p. 692; *Allen* v. *M'Combie's Trs.*, 1909 S.C. 710, L.P. Dunedin at p. 718, Lord Kinnear at p. 721; *Western Bank* v. *Bairds*, 1862, 24 D. 859, Lord Justice-Clerk Inglis at p. 901.

Subsection (22).—*Insured Persons.*

204. The fact that a person has been indemnified, under a policy of insurance, for damage done to his property does not deprive him of his title to sue the person to whose fault or negligence the damage was due; but any sum which he recovers belongs to the insurers, who are entitled to the use of the insured's name in order to make good their right, as parties to a contract of indemnity who have indemnified the party injured, against the wrongdoer.[1] Where the same risk has been insured with two or more offices, the office which pays the sum due under the policy issued by it, has a title to sue the others in its own name for contribution.[2]

Subsection (23).—*Judicial Factors.*

205. A judicial factor has a title to sue necessary actions without special authority. Thus he may sue for debts, such as rent,[3] for a removing,[4] and may raise a declarator, multiplepoinding, and exoneration to settle the rights of claimants on the estate.[5] He has a title to reduce illegal acts and deeds of a body to which he has been appointed factor,[6] or deeds or acts to his ward's prejudice.[7] He may call his predecessors to account,[8] may carry on actions raised by or against them,[9] and may compromise actions.[10]

The fact that the Court authorises a judicial factor to institute proceedings does not decide the question whether he has a title to sue.[11]

Subsection (24).—*Relationship.*

(i) *Husband and Wife.*

206. The general rule is that a consistorial action can be raised and carried through only during the subsistence of the marriage, and that the title to pursue is solely in the injured spouse.[12] Where, however, a husband who had obtained decree of divorce died before a reclaiming

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[1] *Simpson & Co.* v. *Thomson*, 1877, 5 R. (H.L.) 40; *Port-Glasgow and Newark Sailcloth Co.* v. *Caledonian Rly. Co.*, 1892, 19 R. 608.

[2] *Sickness and Accident Assurance Assoc.* v. *General Accident Assurance Corporation*, 1892, 19 R. 977.

[3] *Lumsdaine* v. *Balfour*, 1827, 2 Fac. 472, Lord Mackenzie at pp. 474–5.

[4] *Thomson* v. *Elderson*, 1757, Mor. 4070; *Lumsdaine* v. *Balfour*, 1827, 2 Fac. 472, Lord Mackenzie at p. 474.

[5] *Tait's Factor* v. *Meikle*, 1890, 17 R. 1182.

[6] *Tait* v. *Muir*, 1904, 6 F. 586.

[7] *Carlyle* v. *Lowther*, 1766, M. 8380; *Blaikie* v. *Milne*, 1838, 1 D. 18; *Viscountess Strathallan* v. *Duke of Northumberland*, 1840, 2 D. 840.

[8] *Boyles* v. *Boyle*, 1794, Mor. 2107; *Wardlaw* v. *Mackenzie*, 1859, 21 D. 940.

[9] *Mackintosh's Trs.* v. *M'Queen's Trs.*, 1836, 15 S. 255; *Forbes* v. *Morrison*, 1845, 7 D. 853; *Fraser*, 1850, 12 D. 914.

[10] *Anderson*, 1855, 17 D. 596.

[11] *Boyle*, 1853, 15 D. 420.

[12] Stair, i. 4, 7; Ersk. Inst. i. 6, 43.

note by the wife had been disposed of, his trustees and executors were allowed to sist themselves as respondents to defend the judgment.[1]

A declarator of marriage may be raised by one of the parties to the alleged marriage after the death of the other.[2] The question whether, where the pursuer of an action of declarator of marriage dies *pendente processu*, the executor is entitled to be sisted in order to proceed with the action has not been decided. In *Borthwick* v. *Borthwick*,[3] Lord Young expressed an opinion that he may, while Lord Trayner expressed doubts as to the competency.[4]

A declarator of nullity of marriage, on grounds other than impotency, may be sued not only by either of the parties, but by others who have an interest.[5]

The defender in an action of divorce has a title to sue a cross-action before final decree,[6] or to reclaim against a decree of divorce although defences have not been lodged.[7]

207. A husband has a title to have his wife removed from his house and to have her interdicted from returning thereto, on undertaking to pay aliment to her.[8] He has no title to sue her for slander.[9]

208. A husband may sue for damages and *solatium* for the death of his wife, and *vice versa*,[10] but he has no title as his wife's executor to sue for damages for injuries received by her before her death,[11] unless where a claim had been intimated by the deceased before her death.[12] He has a title to sue for damages for the rape of his wife as a wrong done to himself.[13]

209. A married woman has a title to sue for damages arising *ex delicto*, even where the delict arises out of a contract between her husband and the party responsible. Thus a wife was held entitled to sue a medical man, called in by her husband, for negligence and want of skill in his treatment of her.[14] She has no title to sue for damages in respect of a slander upon her husband after his death.[15]

(ii) *Parent and Child.*

210. The father of a legitimate pupil child has a title to sue on its behalf for injuries which it has sustained through the fault of a third

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[1] *Ritchie* v. *Ritchie*, 1874, 1 R. 826.
[2] *Steuart* v. *Robertson*, 1875, 2 R. (H.L.) 80 ; *Petrie* v. *Petrie*, 1911 S.C. 360 ; *Mackie* v. *Mackie*, 1917 S.C. 276 ; *Davidson* v. *Davidson*, 1921 S.C. 341.
[3] 1896, 24 R. 211.
[4] *Ibid.*, at p. 215.
[5] Fraser, Husband and Wife, p. 1244 ; Bell's Prin., 10th ed., s. 1524.
[6] *Walker* v. *Walker*, 1871, 9 M. 460.
[7] *Ross* v. *Ross*, 1897, 24 R. 1029.
[8] *MacLure* v. *MacLure*, 1911 S.C. 200.
[9] *Young* v. *Young*, 1903, 5 F. 330.
[10] *Eisten* v. *North British Rly. Co.*, 1870, 8 M. 980, L.P. Inglis at pp. 984–5.
[11] *Bern's Exr.* v. *Montrose Asylum*, 1893, 20 R. 859.
[12] *Leigh's Exrx.* v. *Caledonian Rly. Co.*, 1913 S.C. 838.
[13] *Black* v. *Duncan*, 1924 S.C. 738.
[14] *Edgar* v. *Lamont*, 1914 S.C. 277.
[15] *Broom* v. *Ritchie & Co.*, 1904, 6 F. 942.

party.[1] Where he sues on behalf of more than one such child injured through the same act of fault he must specify the sum claimed on behalf of each child.[2] He may compromise the case,[3] and is entitled to demand payment of any sum due to the child and can grant a sufficient discharge therefor.[4]

211. A father may sue an action of damages and *solatium* on his own behalf for his child's death.[5] If the father is dead the mother has a title to sue on behalf of her pupil child for damages for its injuries, or on her own behalf for damages and *solatium* for its death.[6] If he is still alive she has no title to sue, even although she has divorced him.[7]

212. A child has a good title to sue for damages and *solatium* in respect of the death of its parent.[8] And a grandchild whose father was dead and who was dependent upon the earnings of his grandfather was held entitled to sue for damages for his death.[9]

(iii) *Collaterals.*

213. Collaterals have no title to sue for damages or *solatium* for the death of a relative.[10]

(iv) *Illegitimates.*

214. Illegitimate relations have no title to sue as such. A mother cannot sue for damages or *solatium* for the death of her illegitimate child,[11] nor can an illegitimate child claim damages for the death of its mother.[12] The illegitimate child or grandchild or the parent or grandparent of an illegitimate child may claim compensation under the Workmen's Compensation Acts as a dependent on the death of the parent or grandparent or child or grandchild respectively.[13]

(v) *Procedure.*

215. Where several relatives have a title to sue in respect of the death of the same individual, they must, apart from specialties requiring separate actions to be raised, concur in one action.[14] If one relative

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[1] *Cochrane*, 1891, 18 R. 456. [2] *Gray* v. *Caledonian Rly. Co.*, 1912 S.C. 339.
[3] *Gow* v. *Henry*, 1899, 2 F. 48.
[4] *Murray's Trs.* v. *Bloxsom's Trs.*, 1887, 15 R. 233.
[5] *Eisten* v. *North British Rly. Co.*, 1870, 8 M. 980, L.P. Inglis at pp. 984–5.
[6] *Weems* v. *Mathieson*, 1861, 4 Macq. 215; *Barrett* v. *North British Rly. Co.*, 1899, 1 F. 1139.
[7] *Aitken* v. *Gourlay and M'Nab*, 1903, 5 F. 585.
[8] *Eisten* v. *North British Rly. Co.*, 1870, 8 M. 980, L.P. Inglis at pp. 984–5.
[9] *Hanlin* v. *Melrose and Thomson*, 1899, 1 F. 1012.
[10] *Eisten* v. *North British Rly. Co.*, 1870, 8 M. 980.
[11] *Weir* v. *Coltness Iron Co.*, 1889, 16 R. 614; *Clarke* v. *Carfin Coal Co.*, 1891, 18 R. (H.L.) 63.
[12] *Clement* v. *Bell & Sons*, 1899, 1 F. 924.
[13] Workmen's Compensation Acts, 1906 (6 Edw. VII. c. 58), s. 13; 1925 (15 & 16 Geo. V. c. 84), s. 4 (1).
[14] *Darling* v. *Gray & Sons*, 1892, 19 R. (H.L.) 31, Lord Watson at p. 31; *Slorach* v. *Kerr & Co.*, 1921 S.C. 285.

brings an action, and the others are known, intimation to them will be ordered, in order that they may sist themselves if so advised.[1] If the pursuer states on record and undertakes to prove that the others who are entitled to claim have given up their claims, or refuse to press them, or cannot be found, there is no objection to the action going on; but if he does not do so, or state that the others have declined to concur, or call them as defenders for their interest, the action is incompetent.[2]

Subsection (25).—*Bankruptcy Proceedings.*

(i) *Trustee in Sequestration.*

216. The trustee in a sequestration has by virtue of his act and warrant a title "to recover any property belonging or debt due to the bankrupt, and to maintain actions, in the same way as the bankrupt might have done if his estate had not been sequestrated."[3]

The trustee may raise an action himself,[4] or if it has already been raised, he may sist himself and carry it on as trustee.[5] Actions pending at the date of the bankruptcy may be intimated to the trustee on the motion of the opposite party, or by the Court *ex proprio motu*.[6]

The trustee has also a title to sue in regard to *acquirenda*, *i.e.* any estate, wherever situated, which is acquired by the bankrupt after the date of the sequestration and before he has obtained his discharge.[7] He has, however, no title to sue for future salary in respect of an office held by the bankrupt at the date of the sequestration,[8] nor for money earned by the bankrupt's professional labour, apart from special stipulation.[9]

217. The trustee has no title to sue actions concerning the bankrupt's *status* or personal and domestic affairs, as these are matters in which his creditors have no interest. But if the bankrupt's estate is affected in such an action the trustee has a title to intervene. Thus where a wife raises an action of divorce the effect of which if successful will be to entitle her to payment of a sum out of the husband's estate, the husband's trustee can sist himself as a defender.[10] And a trustee on the estate of a bankrupt husband was held to have a title to sue a reduction of a decree of divorce obtained by the wife on the ground that the Court had no jurisdiction over the husband, the purpose of the reduction being to

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[1] *Smith* v. *Wilsons and Clyde Coal Co.*, 1893, 21 R. 162.
[2] *Pollok* v. *Workman*, 1900, 2 F. 354.
[3] Bankruptcy (Scotland) Act, 1913 (3 & 4 Geo. V. c. 20), s. 70; Bankruptcy (Scotland) Act, 1856 (19 & 20 Vict. c. 79), s. 73.
[4] *Howden* v. *Rocheid*, 1868, 6 M. 300.
[5] *Thom* v. *Bridges and Macqueen*, 1857, 19 D. 721.
[6] *Hallowell* v. *Niven*, 1843, 5 D. 655.
[7] Bankruptcy (Scotland) Acts, 1913, s. 98; 1856, s. 103.
[8] *Barron* v. *Mitchell*, 1881, 8 R. 933.
[9] *Mason* v. *Paterson*, 1904 (O.H.), 12 S.L.T. 511.
[10] Fraser, Husband and Wife, ii. 1225; *Greenhill* v. *Ford*, 1824, 2 Shaw's App. 435.

recover certain marriage-contract funds which, as a result of the divorce, had become payable to the wife.[1]

218. A trustee in a sequestration has a title to sue for the reduction of illegal preferences,[2] and he does not need to aver that he represents prior creditors.[3]

219. A trustee who enters into litigation renders himself personally liable to the opposite party for expenses, and that whether he initiates the litigation [4] or defends,[5] or whether he sists himself as pursuer [6] or defender,[7] and he becomes liable for expenses incurred before as well as after he is sisted.[8] If he sists himself as defender he renders himself liable to the whole conclusions of the summons.[9]

(ii.) *Bankrupt.*

220. The general rule is that the bankrupt has no title to sue an action which the trustee can and does take up.[10] But actions relating to the bankrupt's *status* or his personal affairs do not fall within the terms of the trustee's act and warrant, and, accordingly, the bankrupt has a title to sue such actions. Thus he has a title to sue or defend actions of divorce, declarator of marriage, and actions relating to the custody of children.[11] He is also entitled to sue an action for injuries to his person or character,[12] although any sum recovered would fall to the trustee,[13] and the trustee may sist himself. The bankrupt has also a title to sue an action which his trustee refuses to take up or abandons,[14] and he may intervene where he avers that the trustee has made a settlement in bad faith.[15]

A bankrupt has a title to object to a trustee who has resigned getting his discharge,[16] and to petition for the appointment of a new trustee after a former trustee has been discharged.[17]

(iii) *Discharged Bankrupt.*

221. If both the bankrupt and the trustee are discharged, and the former is reinvested in his estates, his radical right revives and

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1 *Corbridge* v. *Somerville*, 1913 S.C. 858.
2 Bankruptcy (Scotland) Acts, 1913, s. 9; 1856, s. 11.
3 *Galbraith* v. *British Linen Co.*, 1898, 36 S.L.R. 139; *Hutton* v. *Hill*, 1901, 8 S.L.T. 467.
4 *Stiven* v. *Reynolds & Co.*, 1891, 18 R. 422, Lord Justice-Clerk Macdonald at p. 426.
5 *A. & B.* v. *Tunnock's Tr.*, 1865, 4 M. 83.
6 *Torbet* v. *Borthwick*, 1849, 11 D. 694.
7 *Watson* v. *Duncan*, 1896 (O.H.), 4 S.L.T. 75.
8 *Torbet* v. *Borthwick*, *supra*.
9 *Watson* v. *Duncan*, *supra*.
10 *Galbraith* v. *Whitehead*, 1863, 1 M. 644, Lord Justice-Clerk Inglis at p. 646; *Graham* v. *Mackenzie*, 1871, 9 M. 798, Lord Cowan at p. 800.
11 Goudy on Bankruptcy, 4th ed., p. 365.
12 *Thom* v. *Bridges and Macqueen*, 1857, 19 D. 721; *Scott* v. *Johnston*, 1885, 12 R. 1022.
13 *Jackson* v. *M'Kechnie*, 1875, 3 R. 130.
14 Bell's Comm., 7th ed., p. 324; *Galbraith* v. *Whitehead*, 1863, 1 M. 644; *Fleming* v. *Walker's Trs.*, 1876, 4 R. 112.
15 *Clarke* v. *Cumming*, 1891, 28 S.L.R. 343.
16 *Duke* v. *Somerville*, 1903, 41 S.L.R. 20.
17 *Macduff* v. *Baird*, 1892, 20 R. 101.

with it his title to sue.[1] Where the bankrupt has not been retrocessed he may sue for behoof of his estate,[2] but not for his own behoof, unless the claim has been abandoned.[3] Where the bankrupt has been discharged, but not retrocessed, and the trustee has not been discharged, the bankrupt has no title to sue.[4]

The radical right of the bankrupt gives him no title to claim unclaimed dividends after his discharge.[5]

(iv) *Creditors.*

222. A creditor has no title to sue a debtor of the bankrupt.[6] He may, however, compel the trustee to give the use of his name on giving security for expenses, or to grant an assignation of the claim.[7] He has no title to open up a compromise entered into by the trustee, with the consent of a majority of the creditors, and a debtor to the estate.[8]

223. A prior creditor has a title to challenge illegal preferences under the Act of 1696, c. 5, but not to recover the subject of the alienation either for himself or for the trustee under a voluntary trust deed.[9] On the other hand, where a debtor granted a trust deed, and subsequently one of the creditors without paying any price but with the consent of the trustee, took possession of and carried on the debtor's business on his own account, another creditor was held to have a good title to sue a declarator that the former was bound to restore the business, or failing his doing so to pay the pursuer's debt ; and for payment of the pursuer's debt.[10]

224. A creditor who does not accede to a voluntary trust deed, but who makes a claim under it, is not barred from suing thereafter for his full debt,[11] even where he has drawn a dividend.[12]

(v) *Voluntary Trust.*

225. A trustee under a voluntary trust deed has no title to sue a reduction of illegal preferences, unless he has a title derived from creditors who themselves have a right to challenge.[13]

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[1] *Donald* v. *Dick*, 1821, 1 S. 64 ; *Reid* v. *Wilson*, 1825, 4 S. 38 (N.E. 39) ; *Russell & Co.* v. *Stewart*, 1829, 7 S. 302 ; *Stevenson, Lauder, and Gilchrist* v. *Dawson*, 1896, 23 R. 496 ; *Gracie* v. *Gracie's Trs.* (O.H.), 1909, 2 S.L.T. 89.

[2] *Whyte* v. *Murray*, 1888, 16 R. 95.

[3] *Macdonald* v. *Macintosh*, 1905, 7 F. 771.

[4] *Galbraith* v. *Whitehead*, 1863, 1 M. 644.

[5] *Air* v. *Royal Bank of Scotland*, 1886, 13 R. 734.

[6] *Henderson* v. *Robb*, 1889, 16 R. 341.

[7] *Spence* v. *Gibson*, 1832, 11 S. 212 ; *M'Kay* v. *Brownlee*, 1866, 4 M. 333 ; *Henderson* v. *Robb*, 1889, 16 R. 341.

[8] *Marshall and Aitken* v. *Campbell's Tr.*, 1889, 16 R. 895.

[9] *Cook* v. *Sinclair & Co.*, 1896, 23 R. 925 ; *M'Laren's Tr.* v. *National Bank of Scotland*, 1897, 24 R. 920.

[10] *J. Smart & Co.* v. *Stewart*, 1910 S.C. 18.

[11] *Athya* v. *Clydesdale Bank*, 1881, 18 S.L.R. 287 ; *Davidson* v. *Union Bank*, 1881, 19 S.L.R. 15 ; *Heritable Securities Investment Association* v. *Wingates*, 1891, 29 S.L.R. 904.

[12] *Ogilvie* v. *Taylor*, 1887, 14 R. 399.

[13] *Fleming's Trs.* v. *M'Hardy*, 1892, 19 R. 542 ; *M'Laren's Tr.* v. *National Bank of Scotland*, 1897, 24 R. 920.

SUBSECTION (26).—*Liquidations.*

226. A liquidator has no title to sue in his own name, but must do so in the name of the company.[1] In a winding-up by the Court the liquidator requires the sanction of the Court to bring or defend any action in the name and on behalf of the company ; [2] and after a winding-up order has been made no action or proceeding can be proceeded with or commenced against the company except by leave of the Court.[3]

SUBSECTION (27).—*Member of Trade Union, Friendly Society, etc.*

227. Where in an action against a trade union it was pled that the pursuer had no title to sue, as he had been expelled, and the pursuer replied that the expulsion had been carried through in *mala fide*, a proof before answer was allowed.[4] In an action by a member of a friendly society to interdict the board of management from paying the expenses of unsuccessful litigation out of the fund it was held that, as the expenses had been already incurred, the pursuer had no interest or title to sue.[5]

SECTION 6.—TITLE AND INTEREST TO DEFEND.

SUBSECTION (1).—*In General.*

228. Every person who is called as a defender has a title to defend the action.[6] The pursuer, by calling him as a defender, in effect concedes his title to defend, otherwise the pursuer's own title would fail from want of interest.[7] But while a party who is called as a defender has a good title to be heard on his defences, these may be found to be irrelevant or incompetent when examined, or he may be held to have no sufficient interest to maintain them.[8]

229. Again, a person who has not been called as a defender may have a title and interest to be heard in defence. Thus a town council or county council, which has a statutory duty, under the Local Government (Scotland) Act, 1894,[9] to protect rights of way, is entitled to be sisted as a defender to an action brought for the purpose of restricting or annulling an alleged right of way.[10] Neither a parish council nor the landward committee of a parish council has such a right, however.[11] A limited

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[1] *Munro* v. *Hutchison*, 1896 (O.H.), 3 S.L.T. 268.
[2] Companies (Consolidation) Act, 1908 (8 Edw. VII. c. 69), s. 151 (1) (*a*).
[3] *Ibid.*, s. 142. [4] *M'Dowall* v. *M'Ghee* (O.H.), 1913, 2 S.L.T. 238.
[5] *Edgar* v. *City of Glasgow Friendly Society*, 1914, 2 S.L.T. 408.
[6] *Drummond* v. *Ross*, 1824, 3 S. 315 (N.E. 223) ; *Pollock* v. *Turnbull*, 1827, 5 S. 195 (N.E. 181).
[7] *Murray's Trs.* v. *Trs. for St Margaret's Convent*, 1906, 8 F. 1109, Lord Kinnear at p. 1116.
[8] *Schaw* v. *Black*, 1889, 16 R. 336 ; *Macleod's Tr.* v. *Murray*, 1891, 18 R. 830 ; *Heron* v. *Martin*, 1893, 20 R. 1001 ; *Houldsworth* v. *School Board of Cambusnethan*, 1904, 7 F. 291 ; *Warrand* v. *Watson*, 1905, 8 F. 253 ; *Earl of Lauderdale* v. *Wedderburn*, 1908 S.C. 1237.
[9] 57 & 58 Vict. c. 58, s. 42 (1). [10] *Alston* v. *Ross*, 1895, 23 R. 273.
[11] *Hope* v. *Landward Committee of Parish Council of Inveresk*, 1906, 8 F. 896.

liability company formed for the purpose, *inter alia*, of preserving public rights of way was held entitled to be sisted as defender, the Court holding that decree against it would be *res judicata* in a question with the public.[1] Generally speaking, the magistrates of a burgh are entitled to defend any action affecting the interest of the inhabitants of the burgh as a whole.[2]

In interdict proceedings a third party, who averred that his interests were affected, was allowed to be sisted as a respondent.[3]

230. A neighbouring proprietor has a right to be sisted as a respondent to a petition to the Dean of Guild Court for authority to erect new buildings, even although his property does not immediately adjoin the petitioner's property,[4] but he must be able to qualify an interest.[5]

Subsection (2).—*The Lord Advocate.*

231. The Lord Advocate has a title to intervene in actions of divorce and nullity of marriage,[6] and in actions to settle charitable schemes.[7]

Subsection (3).—*Representatives.*

232. Where a defender dies *pendente processu*, his trustees have a right to be sisted in his place, even in a consistorial action.[8] But where the deed appointing trustees had gone amissing it was held that they were not entitled to be sisted until an action of proving of the tenor of the lost deed had at least been called.[9]

Subsection (4).—*Trustee in Bankruptcy.*

233. A trustee in bankruptcy is entitled to be sisted in room of a bankrupt defender, but if he sists himself he will render himself liable for the expenses of the opposite party before as well as after he has done so.[10] The trustee is entitled to sist himself even in an action of divorce, if the patrimonial rights of the creditors are affected.[11] A creditor may be entitled to appear, where the trustee has declined to do so, but he can only compel the trustee to give the use of his name on guaranteeing to keep the trustee *indemnis* in the matter of expenses.[12]

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[1] *Macfie* v. *Scottish Rights of Way Society*, 1884, 11 R. 1094.
[2] *Keiller* v. *Magistrates of Dundee*, 1886, 14 R. 191.
[3] *Gas Power and By-Products Co.* v. *Power Gas Corporation*, 1911 S.C. 27. But cf. *Laing's Sewing Machine Co.* v. *Norrie & Sons*, 1877, 5 R. 29.
[4] *Lawrie* v. *Jackson*, 1891, 18 R. 1154.
[5] *Scott's Trs.* v. *Shaw*, 1892, 19 R. 895; *Summerlee Iron Co.* v. *Lindsay*, 1907 S.C. 1161; *Maguire* v. *Smith's Trs.*, 1912 S.C. 410.
[6] Conjugal Rights (Scotland) Act, 1861 (24 & 25 Vict. c. 86), s. 8; *Paul* v. *Paul*, 1896, 4 S.L.T. 124, 171.
[7] Trusts (Scotland) Act, 1921 (11 & 12 Geo. V. c. 58), s. 26.
[8] *Ritchie* v. *Ritchie's Trs.*, 1874, 1 R. 826.
[9] *Geikie* v. *Hutchison*, 1848, 10 D. 354.
[10] *Torbet* v. *Borthwick*, 1849, 11 D. 694.
[11] *Corbridge* v. *Somerville*, 1913 S.C. 858.
[12] *Edgar* v. *Kennedy and Hutton's Tr.*, 1905, 7 F. 452.

Subsection (5).—*Law Agent.*

234. A law agent has a title to be sisted as a defender where his client the defender has obtained a decree for expenses, or a judgment which must lead to an award of expenses, or where there has been collusion between the parties to defeat his claim for expenses.[1]

Subsection (6).—*Party called for his Interest.*

235. A party who is called for any interest he may have has a title to defend as if he had been called in the ordinary way as a defender.[2]

Section 7.—Title to Exclude.

236. A title to exclude is a preliminary plea which may be stated by a defender in an action of reduction, or of reduction improbation. It implies that the defender has an independent and preferable title, so that the pursuer cannot succeed even if the deeds sought to be reduced are reduced.[3]

The former practice, when a preliminary plea, such as one of title to exclude, was pleaded, was to lodge defences confined to this point,[4] although this was not imperative.[5] Now, however, it is incompetent for a defender who objects to satisfying production to lodge preliminary defences ; and if he intends to defend the action he must put in defences stating both his preliminary objections and his defences on the merits.[6]

Where a title to exclude is pleaded, the exclusive title must be exhibited.[7]

237. An illustration of the circumstances which may give rise to the plea is to be found, under the older law, where an heir, who was excluded by an irrevocable deed in *liege poustie*, was open to the plea that, being excluded by that deed, he had no interest and no title to reduce a subsequent deed executed by the granter on deathbed.[8] Examples of the plea may be found in the undernoted cases.[9] A decree in favour of the defender forming *res judicata* in a question with the pursuer will support a plea of title to exclude,[10] but the deed sought to be reduced will

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[1] *Tod and Wright* v. *Wilson and M'Lellan*, 1822, 1 S. 381 (N.E. 358); *M'Lean* v. *Auchinvole*, 1824, 3 S. 190 (N.E. 129); *Cornwall* v. *Walker*, 1871, 8 S.L.R. 442 ; *Crawford* v. *Smith*, 1900, 8 S.L.T. 249 ; *Ammon* v. *Tod*, 1912 S.C. 306 ; *Mitchell* v. *Steven* (O.H.), 1913, 2 S.L.T. 367.

[2] *Scottish Heritages Co.* v. *North British Property Investment Co.*, 1885, 12 R. 550.

[3] Ersk. Inst. iv. 1, 23.

[4] Court of Session Act, 1850 (13 & 14 Vict. c. 36), s. 7.

[5] *Mackintosh* v. *Arkley*, 1868, 6 M. (H.L.) 141.

[6] C.A.S., 1913, C. iv. 4 (*b*).

[7] *Earl of Perth* v. *Lady Willoughby de Eresby's Trs.*, 1869, 7 M. 642, 9 M. (H.L.) 83.

[8] Ersk. Inst. iii. 8, 98.

[9] *Robertson* v. *Megget*, 1822, 1 S. 364 (N.E. 342) ; *Earl of Strathmore* v. *Earl of Strathmore's Trs.*, 1830, 8 S. 530, 1831, 5 W. & S. 170 ; *Ker* v. *Ker's Trs.*, 1830, 8 S. 694, 1831, 5 W. & S. 718.

[10] *Maule* v. *Maule*, 1827, 5 S. 256 (N.E. 238).

not support the plea,[1] nor can prescription [2] or homologation [3] be founded on.

238. It is sometimes a question of circumstances whether the defence is good. Thus where a pursuer sought to reduce both a settlement and a discharge by himself of all claims through the testator's death, and where the defender pleaded that, standing the discharge, the pursuer had no title to call for production of the settlement, it was held that it was in the discretion of the Court to allow the whole cause to proceed at once, and the objection to satisfy production of the settlement until the discharge was reduced was repelled.[4]

Section 8.—Limitation of Actions.

Subsection (1).—*Statutory Limitation—Public Authorities Protection Act*, 1893.

(i) *Terms of Act.*

239. By various statutes a time limit is imposed within which a pursuer must raise his action, in the case of actions against both public bodies and against private individuals.[5] The most important of these statutes is the Public Authorities Protection Act, 1893.[6] Sec. 1 of that Act enacts that any action, prosecution, or other proceeding against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such act, duty, or authority, shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of, or, in the case of a continuance of injury or damage, within six months next of the ceasing thereof. The Act does not affect any proceedings by any Government department against any local authority or officer of a local authority.[7] Nor does it apply to any action, prosecution, or other proceeding for any act done in pursuance or execution or intended execution, of any Act of Parliament, or in respect of any alleged neglect or default in the execution of any Act of Parliament, or on account of any act done in any case instituted under an Act of Parliament when that Act of Parliament applies to Scotland only, and contains a limitation of the time and other conditions for the action, prosecution, or proceeding.[8]

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[1] *Clark* v. *Loudon*, 1856, 18 D. 499.

[2] *Earl of Perth* v. *Lady Willoughby de Eresby's Trs.*, 1869, 7 M. 642, 9 M. (H.L.) 83.

[3] *M'Michan* v. *M'Michan's Trs.*, 1839, 1 D. 1085; *Gall* v. *Bird*, 1855, 17 D. 1027; *Fraser* v. *Macleay*, 1882, 9 R. 1036, Lord Lee at p. 1039.

[4] *Fraser* v. *Macleay*, 1882, 9 R. 1036.

[5] Poor Law Amendment Act, 1845 (8 & 9 Vict. c. 83), s. 86; Public Health (Scotland) Act, 1897 (60 & 61 Vict. c. 38), s. 166; Workmen's Compensation Act, 1906 (6 Edw. VII. c. 58), s. 2; 1925 (15 & 16 Geo. V. c. 84), s. 14.

[6] 56 & 57 Vict. c. 61.

[7] 56 & 57 Vict. c. 61, s. 1.

[8] *Ibid.*, s. 3; *Montgomerie & Co.*, 1908 S.C. 127 (H.L.), 6; *Corporation of Glasgow* v. *Smithfield and Argentine Meat Co.*, 1912 S.C. 364, Lord Salvesen at pp. 373–4.

(ii) *Application of Act.*

240. The Act applies even where the action contains no pecuniary conclusions against the defender, as for example where the summons concluded for reduction of the proceedings connected with a poll under the Temperance (Scotland) Act, 1913, and, alternatively for declarator that the proceedings were null and void.[1] But it does not apply to cases of interdict, where the Court can only give interdict against a continuing wrong ;[2] nor where an incompetent action is brought against persons acting in a public capacity ;[3] nor to an action against a public authority which is in substance an action to determine a question of competing rights and not an action for an act done in pursuance, or execution, or intended execution of any public duty.[4]

241. Again, it is not enough to entitle the defenders to plead the Act that they are a public authority ; the action must have been brought against them in respect of some act done in pursuance of or in the execution of an Act of Parliament, or of some public duty or authority. The Act does not apply where the parties are exercising the ordinary right of creditor and debtor, or where the pursuer founds upon a right given by statute without any limitation of time.[5] Again, the Act was held not to apply to an action of damages brought against police constables in respect of having made a false and malicious charge against the pursuer of assault upon the constables, the Court holding that the Act was not intended to protect an individual who violated his duty and took advantage of his public position to gratify his private malice.[6] Similarly the protection afforded by the Public Health (Scotland) Act, 1867, s. 118, was held not to apply where the defenders had acted *ultra vires*.[7]

The Act applies only where the defenders are under a legal duty to perform the public functions which it serves. Accordingly, a voluntary ambulance association, incorporated by royal charter, was held not to be entitled to the protection of the statute.[8]

242. Where a public authority is authorised to carry on for profit a business such as might be carried on by a private trader, *e.g.* the working of tramways, it is, none the less, entitled to the protection of the Act.[9] Similarly, harbour commissioners were held to be entitled, as

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[1] *Latham* v. *Glasgow Corporation*, 1921 S.C. 694 ; cf. *Stirling* v. *Stirling County Council*, 1900, 7 S.L.T. 351.

[2] *Farquhar and Gill* v. *Magistrates of Aberdeen*, 1912 S.C. 1294, L.P. Dunedin at p. 1302.

[3] *Davidson* v. *Anderson*, 1905, 13 S.L.T. 298.

[4] *Grant & Sons* v. *Magistrates of Dufftown*, 1924 S.C. 952.

[5] *Magistrates of Edinburgh* v. *Heriot's Trust*, 1900, 7 S.L.T. 371 ; *M'Phie* v. *Magistrates of Greenock*, 1904, 7 F. 246 ; *Lanarkshire Upper Ward District Committee* v. *Airdrie, Coatbridge and District Water Trs.*, 1906, 8 F. 777.

[6] *M'Ternan* v. *Bennett*, 1898, 1 F. 333.

[7] *Edwards* v. *Parochial Board of Kinloss*, 1891, 18 R. 867 ; *Mitchell* v. *Magistrates of Aberdeen*, 1893, 20 R. 253 ; *Sutherland* v. *Magistrates of Aberdeen*, 1894, 22 R. 95.

[8] *Ayr* v. *St Andrew's Ambulance Association*, 1918 S.C. 158.

[9] *Spittal* v. *Corporation of Glasgow*, 1904, 6 F. 828.

public authorities, to the benefits of the Act,[1] as were the managers of a reformatory.[2] The officer commanding a volunteer regiment [3] was also held to come under the Act, as the fault alleged against him was neglect of duty in his public capacity as commanding officer. Where rate collectors who were employed by a municipality forcibly entered a house to execute a summary warrant for recovery of rates, although the rates had already been paid, the Act was held to apply in an action by the tenant against the municipality.[4]

(iii) *Procedure.*

243. Where defenders wish to found on the provisions of the Act limiting the time within which action must be brought, the statute must be founded on in the defences ; [5] but where the Act is only founded on with regard to the provisions entitling a successful defender to expenses as between agent and client [6] it is not necessary to plead the Act on record, provided either that the defenders themselves aver, and if necessary prove, that the act complained of was done in the execution of a public duty, or that the pursuer's averments disclose that such was the case.[7]

244. The date from which the six months' time limit for commencing proceedings is measured is the date of the act complained of,[8] or, in the case of a " continuance of injury or damage," the date when the *injuria* and *damnum* cease to concur.[9] Proceedings taken by a person to obtain the benefit of the poor's roll in order to raise an action do not constitute the commencement of proceedings within the meaning of the Act.[10]

(iv) *Expenses.*

245. The Act provides [11] that " wherever in any such action a judgment is obtained by the defendant, it shall carry costs to be taxed as between solicitor and client." It is, however, within the discretion of the Court to deprive the successful defender of expenses for good cause, or to modify expenses ; but expenses, if awarded, must be taxed on the agent and client scale.[12] The expression " judgment " includes a decision of the Inner House as well as a decision in the Outer House.[13]

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[1] *Clyde Salvage Co.* v. *Anstruther Union Harbour Commissioners*, 1908, 15 S.L.T. 888.
[2] *Conolly* v. *Managers of Stranraer Reformatory*, 1904, 11 S.L.T. 638.
[3] *Wilson* v. *1st Edinburgh City Royal Garrison Artillery Volunteers*, 1904, 7 F. 168.
[4] *M'Fadzean* v. *Glasgow Corporation*, 1903, 40 S.L.R. 339, 10 S.L.T. 580.
[5] *Hunter* v. *Dundee Water Commissioners*, 1920 S.C. 628, L.P. Clyde at p. 630.
[6] Public Authorities Protection Act, 1893, s. 1 (*b*).
[7] *Hunter* v. *Dundee Water Commissioners*, 1920 S.C. 628.
[8] *Spittal* v. *Corporation of Glasgow*, 1904, 6 F. 828.
[9] *Brownlie & Son* v. *Magistrates of Barrhead*, 1923 S.C. 915, 1925 S.C. (H.L.) 41.
[10] *M'Ternan* v. *Bennett*, 1898, 1 F. 333, Lord Low at p. 336.
[11] Sec. 1 (*b*).
[12] *Aird* v. *Tarbert School Board*, 1907 S.C. 305, L.P. Dunedin at p. 314.
[13] *Spittal* v. *Corporation of Glasgow*, 1904, 6 F. 828 ; *Aird* v. *Tarbert School Board*, 1907 S.C. 305.

Expenses as between agent and client must be asked for at the time of the award of expenses.[1]

Subsection (2).—*Vexatious Actions.*

246. It may be pleaded that an action is vexatious, and such a plea will fall to be considered like any other, but it has no significance beyond the action in which it is pleaded. If one admitted to the poor's roll satisfies the Inner House at the time of his admission that opposition thereto has been "unreasonable or vexatious," he may be allowed the expenses incurred in his application which are not otherwise regarded as expenses of process.[2]

247. An Act called the Vexatious Actions (Scotland) Act, 1898,[3] "to prevent vexatious legal proceedings in Scotland," gives the Lord Advocate power to apply to either Division of the Inner House for an order; and "if he satisfies the Court that any person has habitually and persistently instituted vexatious legal proceedings without any reasonable ground for instituting such proceedings, whether in the Court of Session or in any inferior Court, and whether against the same person or against different persons, the Court may order that no legal proceedings shall be instituted by that person in the Court of Session or any other Court unless he obtains the leave of the Lord Ordinary on the Bills in the Court of Session, having satisfied the Lord Ordinary that such legal proceeding is not vexatious, and that there is *prima facie* ground for such proceeding. A copy of such order shall be published in the *Edinburgh Gazette*." There are no reported cases in which action has been taken under this Act.

248. In England there is a corresponding statute, the Vexatious Actions Act, 1896.[4] Orders were made under that Act in *Attorney-General* v. *Chaffers* [5] where a person had commenced forty-eight actions against various public officials, such as Judges, the Speaker of the House of Commons, the Archbishop of Canterbury, etc., in none of which he had succeeded except in one in which a payment of £1 (the sum sued for) had been paid into Court by the Treasury Solicitor with a view to saving expense, although the Court took the view that the claim was unfounded. It was laid down that the Court had to consider not whether there may not have been possible causes of action in some of the cases, but the general character and result of the actions.[6] In *In re Jones*,[7] where a plaintiff had brought five actions, all of which were stayed, the last being dismissed as frivolous and vexatious, against the committee of an allotment association, a similar order was made. The words "legal proceedings" have been held not to include criminal proceedings.[8]

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[1] *Magistrates of Aberchirder* v. *Banff District Committee*, 1906, 8 F. 571; *Edinburgh and District Water Trs.* v. *Somerville & Son, Ltd.*, 1907 S.C. 355; *Walsh* v. *Magistrates of Pollokshaws*, 1907, 14 S.L.T. 845.

[2] A.S., 21st Dec. 1842, s. 15; C.A.S. 1913, A, x. 15.

[3] 61 & 62 Vict. c. 35.

[4] 59 & 60 Vict. c. 51.

[5] 1897, 76 L.T. 351.

[6] *Ibid.*, Wright J. at p. 352.

[7] 1902, 18 T.L.R. 476.

[8] *In re Boaler*, [1915] 1 K.B. 21.

Subsection (3).—*Actio personalis moritur cum persona.*

249. "An action for strictly personal wrong dies with the person." This maxim is used to indicate briefly the rule of law with respect to a special class of actions, which fall by the death of the person originally entitled to sue or liable to be sued, and do not transmit to or against executors.

In the Roman law the general rule was that a cause of action did not fall by the death of either party; it was transmissible both "actively" and "passively," that is, both to and against the successors of the parties. *Actiones heredi et in heredem competunt.* There were, however, certain exceptions :—

(1) Actions *ex delicto* did not transmit *against* the heirs of the wrong-doer in so far as they were brought to recover a penalty; [1] and even so far as their object was simply to obtain indemnification for patrimonial loss they were transmissible only to the extent to which the wrong-doer's representatives had been enriched by his delict.[2] On the other hand, where the ancestor had acted fraudulently in a contractual or quasi-contractual relationship, the heir was liable *in solidum.*[3]

(2) Certain actions, viz. the *actio injuriarum*, and actions of that type, did not transmit actively, that is, to the heirs of the person who had had a title to raise them. Generally speaking, actions *ex delicto* did transmit actively, *e.g.* those brought to recover damages for injuries to property; it was held that the heir had a title to sue in respect of the wrong done to him and his ancestor jointly by the diminution of the estate of the defunct. But the *actio injuriarum* was considered to be in a peculiar position; it was founded upon an *injuria* in the narrower sense of the word as equivalent to *contumelia*, an insult or affront,[4] such as assault, slander, verbal or written, etc.[5]; and although it had pecuniary conclusions, it was really intended to appease the wounded feelings rather than to repair patrimonial loss. If, accordingly, the injured party did not choose to resent the wrong by taking legal proceedings, it was not for his heirs to resuscitate an affront which he had once allowed to rest, presumably because he had made up his mind to condone it. Condonation extinguished the right to sue; [6] and it was inferred, if no steps were taken to obtain redress within a year.[7]

(3) The *actio injuriarum* must be distinguished from the action of damages to property founded on the lex Aquilia, or for personal injuries in the case of a free man, founded upon an adaptation of that statute (*utilis actio* legis Aquiliæ).[8] All actions under the Aquilian Statute followed the general rule with respect to the transmission of penal actions, *i.e.* they were actively but not passively transmissible: *hanc actionem et heredi ceterisque successoribus dari constat; in heredem vel*

[1] D. xlvii. 1, 1 pr.
[2] D. xliv. 7, 35; l. 17, 38.
[3] D. l. 17, 152, 3.
[4] Inst. iv. 4 pr.
[5] Inst. iv. 4, 1.
[6] Inst. iv. 4, 12.
[7] D. xlvii. 10, 17, 16.
[8] D. ix. 2, 13 pr.

cæteros hæc actio non dabitur, cum sit pœnalis, nisi forte ex damno locupletior heres factus sit.[1]

None of the foregoing restrictions upon the survival of causes of action applied, if the action had been instituted and followed out to the stage of litis-contestation in the lifetime of the original party.

250. The maxim, *actio personalis moritur cum persona*, can only be reconciled with the Roman doctrine of transmission of actions either by assuming (as has been suggested), that *personalis* is a mistake for *pœnalis*, in which case the maxim so corrected might be used to express the special rule governing penal actions; or by limiting the term *personalis actio* to action for wrong done to the person (*injuria*), as opposed to actual damage done to the property (*damnum*). In that sense the *actio injuriarum* might be characterised as personal, in the same way as a usufruct is sometimes said to be *jus personalissimum* (*i.e.* it is so closely attached to the personality of the fructuary that it expires with him), or as an action for breach of promise of marriage is held to be strictly personal.

251. In the law of Scotland, while the term *actio personalis* is recognised in the division of actions into real and personal, it implies no more than an action founded on a personal obligation, or *jus ad rem*;[2] and although the maxim *actio personalis*, etc., has come to be accepted as expressing a rule of the law of Scotland, its use, it has been said, is to be avoided.[3] In the sense in which the maxim is employed in the Roman law it forms no part of the law of Scotland.[4]

As applied, however, to a claim of damages for personal injuries the brocard correctly expresses the rule of Scots law, that, in the ordinary case, the right to raise proceedings is personal to the injured person, and does not transmit to his executors.[5] The case of *Auld* v. *Shairp*[6] has been cited as an authority for the proposition that where, in addition to a claim for personal injury, there is a claim for patrimonial loss, the claim transmits, but that construction of the decision in *Auld*[6] was severely criticised by Lord Dunedin in the case of *Riley*,[7] and the case cannot be relied on as supporting the proposition.

252. But where action was raised during the lifetime of the party,[8] or even where, although no action had actually been raised a claim for damages had been intimated,[9] the claim transmits and the executor has a title to sue. And it has been held that a claim by dependants in respect of the death of the person upon whom they were dependent is assignable, and gives the assignee a title to sue.[10]

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[1] D. ix. 2, 23, 28.
[2] Ersk. Inst. iv. 1, 10.
[3] *Riley* v. *Ellis*, 1910 S.C. 934, Lord Johnston at p. 937.
[4] *Riley* v. *Ellis*, *supra*, L.P. Dunedin at p. 943; *Davidson* v. *Tulloch*, 1860, 3 Macq. 783.
[5] *Bern's Exr.* v. *Montrose Asylum*, 1893, 20 R. 859; *Boyce's Exr.* v. *M'Dougall*, 1903, 5 F. 452.
[6] 1874, 2 R. 191 and 940.
[7] 1910 S.C. 934, at pp. 943–4.
[8] *Neilson* v. *Rodger*, 1853, 16 D. 325; *Darling* v. *Gray & Sons*, 1892, 19 R. (H.L.) 31, Lord Watson at p. 31.
[9] *Leigh's Exrx.* v. *Caledonian Rly. Co.*, 1913 S.C. 838.
[10] *Traill & Sons* v. *Actieselskabet Dalbeattie*, 1904, 6 F. 798.

Where the pursuer in an action of declarator of marriage, or alternatively of damages for breach of promise and seduction, died during the dependence of the action, her executor was held entitled to be sisted as a pursuer to the effect of pursuing the conclusion for damages,[1] and an opinion was expressed by Lord Young [2] that the executor of the pursuer of an action of damages was entitled to be sisted as pursuer and to proceed with the action. And where the successful pursuer in an action of divorce died before a reclaiming note had been disposed of, his executors and trustees were sisted to support the judgment.[3]

253. Under the Workmen's Compensation Acts, a right to compensation vests in the dependant of a workman on the workman's death, and transmits to the representatives of the dependant although the dependant has made no claim during his lifetime.[4]

254. A claim of damages as *solatium* for wounded feelings may be constituted and enforced against the representatives of the wrongdoer after his death.[5]

Section 9.—Divisions of Actions.

Subsection (1).—*Civil and Criminal.*

255. The most general division of actions is into civil and criminal. Actions of the latter kind are called prosecutions, and are dealt with in the Criminal Courts, *i.e.* the High Court of Justiciary or the Sheriff Court in the exercise of its criminal jurisdiction. As a general rule, criminal actions are excluded from the jurisdiction of the Court of Session. But a crime is a civil wrong, and reparation to the individual wronged thereby may be sought in the Court of Session. And the Court of Session has a *quasi*-criminal jurisdiction in the matter of petitions and complaints for breach of interdict, or malversation in certain offices, and in cases where the authority of the Court has been defied or treated with contempt. On the other hand, the High Court of Justiciary is the Court of Appeal under the Small Debt Acts.[6]

Subsection (2).—*Actions and Petitions.*

256. Civil actions may be divided, in a general way, into *actions* and *petitions*. The distinction is, however, formal. A petition is also an action in the wider sense. Formerly, all actions in the Sheriff Court were commenced by way of a petition, whereas now actions are commenced in the Sheriff Court by way of an initial writ in the form prescribed by the Sheriff Courts (Scotland) Act, 1907.[7] In the Court of Session an action is commenced by a summons, in which the party against whom

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[1] *Borthwick or Green* v. *Green*, 1896, 24 R. 211.
[2] *Ibid.* at p. 214.
[3] *Ritchie* v. *Ritchie*, 1874, 1 R. 826.
[4] *Hendry* v. *United Collieries*, 1909 S.C. (H.L.) 19.
[5] *Evans* v. *Stool*, 1885, 12 R. 1295.
[6] 7 Will. IV. & 1 Vict. c. 41, s. 30.
[7] 7 Edw. VII. c. 51; First Schedule, Rule 1.

decree is sought by the pursuer is called as the defender, and in which the remedy asked is set forth in definite conclusion. A petition, on the other hand, concludes with a prayer in which the Court in virtue of its statutory powers or its *nobile officium* is prayed to grant a specified remedy, with usually an alternating crave for such other remedy as the Court may think proper in the circumstances. Although both may become contentious, an action is from the beginning definitely so, as the pursuer of an action always has in view a particular party or parties against whom he seeks a judgment of the Court, whereas in a petition, the petitioner merely indicates in the prayer of the petition the party or parties from whom opposition may be expected, and craves warrant to serve the petition upon them as respondents.

257. An action is a writ in the name of the Sovereign, and may be served after the summons has passed the Signet. A petition, on the other hand, is addressed to the Court, and requires the Court's sanction before it can be served.

Subsection (3).—*Division of Civil Actions according to their Conclusions.*

258. Civil actions, as distinguished from petitions, may be divided into (*a*) declaratory; (*b*) rescissory; (*c*) petitory; (*d*) possessory; (*e*) penal; (*f*) competitive; and (*g*) relative to execution. An action may combine more than one of the foregoing characteristics.

(i) *Declaratory Actions.*

259. A declaratory action, or Declarator, is one in which some right of property, servitude, or *status*, or some inferior right, which is contested or imperfectly defined, is sought to be declared in favour of the pursuer, but where nothing is demanded to be paid or performed by the defender.[1] It is incompetent, however, to bring an action to have a fact declared without any legal consequences.[2] Again, where a person who had been refused accommodation in an hotel brought an action concluding for declarator that he was entitled to be received by the proprietor of the hotel as a *bona fide* traveller, provided the defenders had sufficient room and accommodation, at such time as he, as a *bona fide* traveller applied to the defenders to be received, entertained, and lodged in their hotel, it was held that, as the pursuer merely sought to have the legal relations in general between travellers and innkeepers declared, the action was incompetent.[3]

260. It is incompetent to raise a bare abstract declarator of the meaning of an Act of Parliament.[4] But where a question arises of

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[1] Ersk. Inst. iv. 1, 46.
[2] *Gifford* v. *Trail*, 1829, 7 S. 854; *Lyle* v. *Balfour*, 1830, 9 S. 22.
[3] *Rothfield* v. *North British Rly. Co.*, 1920 S.C. 805.
[4] *Steuart* v. *Parochial Board of Keith*, 1869, 8 M. 26.

liability or exemption from liability to make a continuing or recurrent payment imposed by statute, the question can competently be raised in a declarator ; [1] and, similarly, where the question is as to the meaning of an obligation imposed by statute, an action of declarator may competently be brought by persons having a title and interest to see that the obligation is implemented.[2] Contingent rights may be the subject of a declarator if they are disputed.[3] See DECLARATOR.

(ii) *Rescissory Actions.*

261. A recissory action, or action of reduction, is an action to rescind or annul any deed, decree, or other written document, or any illegal act done, to the prejudice of the pursuer.[4] The action is competent whether the deed or act sought to be set aside is valid until reduced, or is one which is *ipso jure* null.[5] It is available for the purpose of reducing decrees of Inferior Courts or of the Court of Session either on grounds inferring nullity, such as want of jurisdiction, fraud, perjury, or irregularity of procedure, or even on the merits in certain circumstances.

Where forgery is the ground of reduction, the action is known as a reduction-improbation. In other cases the action is called simply a reduction.

262. Formerly, the summons in an action of reduction was a somewhat cumbrous document. The old form has not been abolished but a simpler form has been introduced, and where the old form is employed it is not competent for the agent to charge any higher fees for the preparation of the summons, or in connection with the procedure in the action than if the new form had been used.[6] See REDUCTION.

(iii) *Petitory Actions.*

263. "Petitory actions are so called, not because something is sought to be awarded by the judge (for in that sense all actions must be petitory), but because some demand is made upon the defender, in consequence either of a right of property or credit in the pursuer. Thus actions for restitution of moveables, actions of poinding, of furthcoming, and indeed all personal actions upon contracts or *quasi* contracts . . . are petitory." [7] Actions for payment, or for count and reckoning, implement or damages, are all petitory actions. In actions of damages for personal injury or breach of contract, the whole damage must be

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[1] *Hogg* v. *Parochial Board of Auchtermuchty*, 1880, 7 R. 986.

[2] *Norfor* v. *Aberdeenshire Education Authority*, 1923 S.C. 881, 1924 S.C. 590; *Sullivan* v. *Close*, 1898, 6 S.L.T. 2.

[3] *Mackenzie's Trs.* v. *Mackenzie's Tutors*, 1846, 8 D. 964; *Magistrates of Edinburgh* v. *Warrender*, 1863, 1 M. 887.

[4] Ersk. Inst. iv. 1, 18 ; Stair, iv. 20, 2.

[5] *M'Millan* v. *Free Church*, 1861, 23 D. 1314, Lord Curriehill at p. 1336.

[6] A. S., 20th March 1907, s. 3 ; C.A.S., C, iv. 4 (*a*).

[7] Ersk. Inst. iv. 1, 47.

recovered in one action, although at the date of the action it is impossible to ascertain precisely the extent of the loss.[1]

(iv) *Possessory Actions.*

264. Possessory actions are those wherein an absolute right is not insisted for, but possession is claimed to be attained, retained, or recovered.[2] They do not proceed upon some absolute right in the pursuer but upon the state of possession, or, in other words, the practice of the last seven years.[3] In older practice special forms of possessory actions were employed such as Molestation,[4] Spuilzie,[5] Intrusion and Ejection,[6] and Succeeding in the Vice.[7] These are now obsolete, and in most cases possessory actions take the form of interdicts or suspensions and interdicts. Actions of removing, and of maills and duties, are also deemed possessory actions when not based upon an absolute right of property in the pursuer.

265. Where the respondent in a suspension and interdict has done any act which the Court might have prohibited by interdict, it is competent to the pursuer to obtain from the Court an order on the respondent to perform any act which may be necessary for reinstating the complainer in his possessory right, or for granting specific relief against the illegal act complained of.[8] The restoration of real or personal property which has been violently or fraudulently taken away may be ordered by the Court upon a summary petition.[9]

(v) *Penal Actions.*

266. Penal actions are actions which conclude not only for indemnification but for extraordinary damages by way of penalty. Such actions do not transmit against the representatives of the delinquent.[10]

(vi) *Competitive Actions.*

267. Competitive actions or competitions are actions in which two or more persons are claimants for the same right or upon the same fund. The action of multiplepoinding is the chief action of this kind. This action, the original purpose of which was to decide between parties who had each done diligence upon the same fund, is now held to be competent wherever there are separate and hostile claims upon the same fund. The essential element is that there is double distress.[11] See MULTIPLEPOINDING.

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[1] *Stevenson* v. *Pontifex and Wood*, 1887, 15 R. 125.
[2] Stair, iv. 3, 47.
[3] *Stobbs* v. *Caven*, 1873, 11 M. 530, Lord Deas at p. 534.
[4] Ersk. Inst. iv. 1, 48.
[5] Stair, i. 9, 16.
[6] Stair, i. 9, 25; Ersk. Inst. iii. 7, 16.
[7] Stair, ii. 9, 45.
[8] Court of Session Act, 1868, s. 89.
[9] *Ibid.*, s. 91.
[10] Ersk. Inst. iii. 1, 15; iv. 1, 14; Bell, Prin., ss. 544 and 546; *Auld* v. *Shairp*, 1874, 2 R. 191, Lord Neaves at p. 199.
[11] *Russel & Son* v. *Johnston*, 1859, 21 D. 886, Lord Kinloch at p. 887; *Glen's Trs.* v. *Miller*, 1911 S.C. 1178.

(vii) *Actions relative to Execution.*

268. (*a*) *Adjudication* is the action by which a creditor may have his debtor's heritable property adjudged to him for his debt, either in security or in execution.

(*b*) *Poinding* is the action by which a debtor's moveable property is transferred to his creditor.

(*c*) *Furthcoming* is the action whereby a creditor who has arrested his debtor's moveable property or money in the hands of a third party asks to have the arrested property or funds transferred to himself.

(*d*) *Sequestration* is the action by which, in case of bankruptcy, the whole of the bankrupt's estate is transferred to a trustee for the purpose of equitable distribution among his creditors.

(*e*) *Suspension*, as distinguished from suspension as a process of review, is the action whereby the execution of real or personal diligence is stayed. It is divided into suspension and suspension and interdict, which apply to the former, and suspension and liberation, which applies to the latter. As civil imprisonment is now limited to duress for taxes or aliment, or *ad factum præstandum*, suspension and liberation is now seldom met with.

Subsection (4).—*Consistorial Actions.*

269. Consistorial actions are actions arising out of the relation of husband and wife. They belonged, originally, to the jurisdiction of the Ecclesiastical or Consistorial Courts, and were finally transferred to the Court of Session by 11 Geo. IV. and 1 Will. IV. c. 69, s. 33, and 13 & 14 Vict. c. 36, s. 16. They include actions of declarator of marriage, nullity of marriage, legitimacy and bastardy, actions of divorce and of separation *a mensa et thoro*,[1] actions of adherence,[2] actions of putting to silence, and actions of aliment as between husband and wife.[3]

Subsection (5).—*Maritime Actions.*

270. Maritime actions formerly belonged to the Court of Admiralty, but they were transferred to the Court of Session by 11 Geo. IV. and 1 Will. IV. c. 69, s. 21, and summonses in Admiralty causes may be raised and may pass the Signet like other Court of Session summonses.[4]

271. Nautical assessors may, if the Court thinks fit, and, on the application of any party, must be summoned to assist the Court in any action or proceeding arising out of or relating to collision at sea, salvage, towage, or any other maritime matter.[5] The judge before whom any cause is tried, with the assistance of a nautical assessor or assessors summoned under the Act, is required to make a note of the questions submitted by him to such assessor or assessors, and of the answer or

[1] 11 Geo. IV. and 1 Will. IV. c. 69, s. 33.
[2] 13 & 14 Vict. c. 36, s. 16.
[3] 24 & 25 Vict. c. 86, s. 19.
[4] 1 & 2 Vict. c. 118, s. 29.
[5] Nautical Assessors (Scotland) Act, 1894 (57 & 58 Vict. c. 37), s. 2.

answers thereto.[1] The fees exigible in maritime causes in the Court of Session are the same as those exigible in any ordinary action.[2]

272. Salvage disputes fall to be determined in Scotland by the Court of Session, except in certain cases in which the dispute is directed to be determined "summarily," *i.e.* by the Sheriff Court.[3] These cases are (1) where the parties to the dispute consent; (2) where the value of the property saved does not exceed £1000; and (3) where the amount claimed does not exceed £300. In the Court of Session, if the claimant does not recover more than £300 he is not entitled to expenses, unless the Court before which the case is tried certifies that the case was a fit one to be tried otherwise than summarily in manner provided by the Act.[4]

Subsection (6).—*Inner and Outer House Actions.*

273. The division of actions into Inner and Outer House actions is now of little importance. All Court of Session actions now commence in the Outer House by summons, and only reach the Inner House by reclaiming note, or, in exceptional cases, by report of the Lord Ordinary. There are, however, certain actions which commence in the Outer House, but are transferred to the Inner House for judgment. These are Division of Commonty, Division of Runrig Lands, Ranking and Sale, and Cognition and Sale.

(i) *Division of Commonty.*

274. In this action the summons is called and enrolled in the Outer House, where the record is made up, incidental or preliminary questions decided, and proof is taken. After proof great avizandum is made by the Lord Ordinary to the Inner House with the proof.[5]

(ii) *Division of Runrig Lands.*

275. In these actions, which are practically obsolete, the procedure is similar to that in actions of division of commonty.[6]

(iii) *Ranking and Sale.*

276. This action, although almost superseded by the simpler procedure of the Bankruptcy Acts,[7] is still competent.[8] The summons is enrolled and the cause conducted before the Lord Ordinary, who

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[1] Nautical Assessors (Scotland) Act, 1894 (57 & 58 Vict. c. 37), s. 3; *S.S. Rowan* v. *S.S. West Camak*, 1923 S.C. 316.

[2] Clerks of Session (Scotland) Regulation Act, 1889 (52 & 53 Vict. c. 54), s. 9.

[3] Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 547 (1), (2), and (4) (*b*).

[4] *Ibid.*, s. 547 (2); *Newhaven Trawlers, Ltd.* v. *Devlin*, 1902, 9 S.L.T. 382.

[5] Act 1695, c. 69 (record ed.), c. 38 (12 mo. ed.); A.S. 18th June 1852; C.A.S., C, iv. 1.

[6] Act 1695, c. 36 (record ed.), c. 23 (12 mo. ed.); *Russel* v. *York Buildings Co.*, 1774, Mor. 14144.

[7] Goudy on Bankruptcy, 4th ed., p. 497.

[8] *Cannon's Trs.* v. *Lake*, 1883, 21 S.L.R. 101; Bankruptcy Act, 1913 (3 & 4 Geo. V. c. 20), ss. 92, 130.

pronounces an interlocutor of ranking and superintends the sale. The final decree approving the sale is pronounced by the Inner House on the report of the Lord Ordinary.[1]

(iv) *Cognition and Sale.*

277. This is a process brought in the Court of Session for obtaining judicial authority to sell the whole or part of a pupil's heritable estate. It has now been practically superseded by petition.[2] The action proceeds at the instance of the pupil and his tutors, the defenders being the parties entitled to succeed to the heritage on the pupil's death. The procedure is similar to that in ranking and sale. The final interlocutor authorising the sale is pronounced by the Inner House on the report of the Lord Ordinary.[3]

278. The action of *proving the tenor* was until recently an Inner House action, but it now proceeds as and is subject to the like review as if it were an ordinary petitory action, except that, even where undefended, proof is necessary.[4]

Special cases can be brought only in the Inner House.[5]

(v) *Petitions.*

279. With regard to *Petitions*, as the Inner House has original jurisdiction in all cases in which the *nobile officium* of the Court is appealed to, all summary petitions used to be brought before the Inner House, which sometimes remitted them to a Lord Ordinary. By the Distribution of Business Act,[6] however, " all summary petitions and applications to the Lords of Council and Session which are not incident to actions or causes actually depending at the time of presenting the same shall be brought before the Junior Lord Ordinary officiating in the Outer House, who shall deal therewith and dispose thereof as to him shall seem just ; and in particular all petitions and applications falling under any of the descriptions following shall be so enrolled before and dealt with by the Junior Lord Ordinary, and shall not be taken in the first instance before either of the two Divisions of the Court, viz. :—

" 1. Petitions and applications under any of the various statutes now in force relative to entails :

" 2. Petitions and applications under any of the General Railway Acts, or under the Lands Clauses Consolidation (Scotland) Act, 1845, or under any local or personal Act :

" 3. Petitions and applications relative to money consigned under any statute or law, subject to the order, disposal, or direction of the Court of Session :

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[1] Act, 1681, c. 83 (record ed.), c. 17 (12 mo. ed.) ; Mackay's Manual, p. 177.
[2] *White*, 1855, 17 D. 599.
[3] Mackay's Manual, p. 177.
[4] A.S., 20th March, 1907, s. 7 ; C.A.S., C, iv. 5.
[5] Court of Session Act, 1868 (31 & 32 Vict. c. 100), s. 63.
[6] Court of Session Act, 1857 (20 & 21 Vict. c. 56), s. 4.

" 4. Petitions and applications for the appointment of judicial factors, factors *loco tutoris* or *loco absentis*, or *curators bonis*, or by any such factors or curators for extraordinary or special powers, or for exoneration or discharge :

" 5. All petitions, applications, and reports under the Act of the 12th and 13th Victoria, chapter 51, intituled *An Act for the Better Protection of the Property of Pupils, Absent Persons, and Persons under Mental Incapacity, in Scotland.*"

These petitions and application have now been transferred to the the Bill Chamber.[1]

Petitions under the Trusts Act, 1921, may be brought before any Lord Ordinary,[2] as may certain other petitions. See PETITIONS.

Petitions based on the supreme equitable jurisdiction of the Court of Session must be presented in the Inner House.

SUBSECTION (7).—*Principal and Accessory.*

280. An accessory action is an action which is rendered necessary by incidental or unexpected circumstances to enable another action, called the principal action, to be resumed or carried on. This division of action is now of little importance. The principal accessory actions were Wakening, Transference, Supplementary Summonses, Exhibition *ad probandum*, Transumpt, and Proving the Tenor.

(i) *Wakening.*

281. This action was necessary where no step in the principal action had been taken for a year and day. It was not, however, necessary in summary petitions [3]—cases where issues have been adjusted, Exchequer causes commenced by *subpœna*, or in Inner House processes.[4] A minute of wakening has now been substituted for the action, and is necessary whether the action has been sisted or not.[5] But a cause in which appearance has not been entered cannot competently be wakened by a minute of wakening, the proper course being by summons of wakening.[6]

(ii) *Transference.*

282. An action of transference was at one time necessary to transfer the suit on the death of a party. It has not been necessary in the case

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[1] Clerks of Session (Scotland) Regulation Act, 1889 (52 & 53 Vict. c. 54), s. 3.

[2] 11 & 12 Geo. V. cap. 58, s. 26.

[3] *Wemyss*, 1860, 22 D. 556.

[4] *Gillies* v. *Scott*, 1829, 7 S. 839 ; *American Mortgage Co. of Scotland* v. *Sidway*, 1906, 14 S.L.T. 521.

[5] Court of Session Act, 1868 (31 & 32 Vict. c. 100), s. 95 ; *American Mortgage Co. of Scotland* v. *Sidway*, 1906, 14 S.L.T. 521.

[6] *Lorrain's Trs.* v. *Brodie*, 1881, 19 S.L.R. 278. But cf. *Mowatt* v. *Mowatt*, 1910, 2 S.L.T. 205.

of a pursuer since 1693,[1] or of a defender since 1868.[2] A minute craving transference of the cause is all that is now required.[3] The minute may, where necessary, crave for both transference and wakening.[4]

(iii) *Supplementary Summons.*

283. A supplementary action was at one time necessary to restrict, alter, or add to the parties or conclusions of the original summons. But the conclusions of a summons may now be restricted by minute on the summons,[5] and the wide powers of amendment which now exist seem to have rendered a supplementary summons unnecessary. Thus, it is competent to sist any other person as pursuer in substitution for, or in addition to the original pursuer, to alter the capacity in which a party sues or is sued, to insert the name of any additional defender who has an interest in the cause, to increase the sum sued for, to subject additional funds or property to the adjudication of the Court, or to make any amendment necessary for the purpose of determining the real question in controversy between the parties, upon such terms as to expenses as to the Court shall seem proper.[6]

(iv) *Exhibition ad Probandum.*

284. This action, which has been practically superseded by motion for diligence against havers, was at one time necessary where writings required to be produced in evidence were in the hands of a third party.[7] It is still competent where a party to an action shews sufficient cause to entitle him to inspect writings which cannot be recovered by diligence, as where there is a substantive action before another Court which has no power to order production of the documents.[8] The documents, are exhibited when ordered, in the hands of the Clerk of Court, and are not put into process.[9] This action must be distinguished from that of exhibition *ad deliberandum*, to enable an heir to decide whether he shall make up his title, which is a principal action.

(v) *Transumpt.*

285. This action " is competent to any person who has a partial interest in a writing, or immediate use for it to support his titles or defences in other actions against him in whose custody the writing lies,

[1] Act, 1693, c. 24 (record ed.), c. 15 (12 mo. ed.).
[2] Court of Session Act, 1868 (31 & 32 Vict. c. 100), s. 96.
[3] *Ibid.*
[4] *Ibid.*, s. 96.
[5] Court of Session Act, 1868 (31 & 32 Vict. c. 100), s. 23.
[6] A.S. 20th March 1907, s. 2; C.A.S., 1913, B. i. 1–7.
[7] Stair, iv. 33, 3.
[8] *Campbell* v. *Campbell*, 1869, 7 M. 759, L.P. Inglis at pp. 762, 763.
[9] *Clark* v. *Melville*, 1880, 8 R. 81.

to exhibit it, that so a transumpt thereof may be judicially made out and delivered to the pursuer." [1] Although rarely seen nowadays, this action is still competent.[2]

(vi) *Proving the Tenor.*

286. This is an action in which the terms of a document which has been lost, destroyed, or obliterated are sought to be declared. It is still necessary except where a summons, petition, or other original writ or pleading has been lost or destroyed, in which case a copy may be proved.[3] This provision now extends to lost interlocutor sheets.[4] Proving of the tenor may also be a principal action.

Subsection (8).—*Real and Personal Action.*

287. Actions are also divided into actions *in rem* and actions *in personam*, or real and personal actions. A real action is an action founded in a *jus ex re*, or right of property in a subject. A personal action is one founded only on a personal obligation, or *jus ad rem* or *in personam*.

Subsection (9).—*Private and Popular Actions.*

288. This division of actions, which was made in the civil law, is not recognised in the law of Scotland, with two exceptions,—(1) actions by kinsmen of minors in suspect tutory, or reducing deeds granted by the minor to his hurt and satisfied on his oath,[5] and (2) action for vindication of a public right.

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[1] Ersk. Inst. iv. 1, 53.
[2] *Selkirk* v. *Service*, 1880, 8 R. 29, L.P. Inglis at p. 30.
[3] Court of Session Act, 1868 (31 & 32 Vict. c. 100), s. 15.
[4] A.S. 20th March 1907, C.A.S., A, iii. 8.
[5] Stair, i. 6, 26; Ersk. Inst. iv. 1, 17; Act, 1681, c. 85 (record ed.), c. 19 (12 mo. ed.).

ACTOR, OR ACT AND PART.

See CRIME.

ACTOR SEQUITUR FORUM REI.

See JURISDICTION; MAXIMS.

ACTUS.

See SERVITUDE.

ADEMPTION.

See LEGACY.

AD FACTUM PRÆSTANDUM.

See DECREE; IMPRISONMENT FOR DEBT; OBLIGATION.

AD FUNDANDAM JURISDICTIONEM.

See ARRESTMENT; JURISDICTION.

ADHERENCE.

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Section 1.—The Duty of Adherence.

289. It is the primary duty of married persons to live together, or, as it is expressed, to adhere to each other until the dissolution of the marriage. The husband as the head of the house has the right to determine where the house shall be, and the duty of the wife is to accompany him to any place he may choose.[1]

290. The duty of mutual adherence is not specifically enforced. A husband may order his wife to leave his house and reside in another provided by him, and if he offer her aliment may obtain decree for her removal and ejection and interdict against her return.[2] A wife may similarly have her husband removed from a house which she owns. But the spouse so exercising his or her patrimonial rights is not thereby relieved to any extent of the duty of adherence.[2] Where the cruelty of one spouse has made the continual cohabitation dangerous to the health or safety of the other, the remedy is Judicial Separation. Where the non-adherence has been obstinately persisted in for four years the remedy is Divorce for Desertion. Where a wife who had got a decree for aliment arrested funds of the husband until he should adhere, the Court recalled the arrestment as incompetent.[3]

291. Non-adherence is the refusal to live in family with the other. It is not non-adherence to refuse sexual intercourse. Where the spouses are living together at bed and board it cannot be said that either "divertis fra utheris companie" in the sense of the Act, 1573, c. 55, and accordingly the remedy of divorce for desertion introduced by that Act does not apply to such a case.[4] The old case of *Graham*,[5] upon which the opinion of Fraser to the contrary was founded,[6] must now be regarded as wrongly decided.

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[1] Stair, i. 4, 8; Ersk. i. 6, 19, and 44; Bell, Prin. 1538; Fraser, ii. 867; Walton, H. & W., 2nd ed., 92; *Ringer* v. *Churchill*, 1840, 2 D. 307; *Mackenzie*, 1893, 20 R. 636; 22 R. (H.L.) 32.

[2] *Maclure*, 1911 S.C. 200.

[3] *Macgregor*, 1836, 14 S. 707.

[4] *G.* v. *G.*, 1923 S.C. 175; *C.* v. *D.*, 1921, 2 S.L.T. 82; *X.* v. *Y.*, 1914, 1 S.L.T. 366; Elchies, Annot. 6; Bankt. i. 5, 132.

[5] Feb. 27 1567, MSS. Records Com. Court, vol. ii.

[6] Fraser, ii. 1209.

Section 2.—The Action of Adherence.

292. An action of adherence was formerly [1] an indispensable preliminary to an action of divorce for desertion. But this necessity was removed by the Conjugal Rights Act, 1861.[2] This change is one of procedure merely. Non-adherence must still be proved, but this can be done in the suit for divorce.[3] An action of adherence appears to be still competent,[4] but except where aliment is also concluded for is unknown in practice.

Section 3.—Defences to Action of Adherence.

293. It is a good defence that the pursuer has been guilty of cruelty or adultery, unless the offence has been condoned.[5] A wife who has got a protection order under the Conjugal Rights Act, 1861,[6] is not bound to adhere unless the order is recalled. It would be a good defence that the marriage was null.[7]

294. It is not a defence that the pursuer is insane: [8] or that the pursuer was the first to desert if afterwards desirous to adhere: or that the pursuer has consented to a deed of voluntary separation, for such a deed is revocable. Even if the deed contain *in gremio* an admission of cruelty or adultery, the offender may still raise an action of adherence, and the defender must prove the cruelty or the adultery if the defence is to be successful.[9] Nor is it a defence in the mouth of the husband that although he will not live with his wife he has provided her with a suitable residence and with aliment.[10] If the defender should offer to adhere and the pursuer avers that the offer is not made in good faith, the Court may supersede consideration of the cause for a reasonable time to give the defender an opportunity of carrying his offer into effect.[11]

295. It is still an open question whether any defence is good which would not be a ground for judicial separation. There is a considerable body of authority for the view that where neither cruelty in the sense required for separation, nor adultery, can be proved, the parties

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[1] Act 1573, c. 55.

[2] 24 & 25 Vict. c. 86, s. 11.

[3] *Watson*, 1890, 17 R. 736; *Mackenzie, ut supra.*

[4] *Mackenzie*, 1893, 20 R., per Lord Young at p. 664.

[5] *Lang*, 1851, 13 D. 408; *A. B.* v. *C. D.*, 1853, 16 D. 111; *Mackenzie, ut supra*; Fraser, i. 872.

[6] 24 & 25 Vict. c. 76, s. 3.

[7] *Ricketts*, 1866, 35 L.J. Mat. at p. 92.

[8] *Hayward*, 1858, 1 S. & T. 81; Fraser, ii. 873; but see *Radford*, 1869, 20 L.T. (N.S.) 279.

[9] *A. B.* v. *C. D.*, 1853, 15 D. 372, and 16 D. 111; *Lawson* v. *M'Culloch*, 1797, Mor. 6157; *Martin*, 1895, 3 S.L.T. 150 (L. Kincairney); Fraser, ii. 872, 915.

[10] *Colquhoun*, 1804, Mor. App., *vide* H. & W., No. 5; *Webster*, 1820, N.R., cited by Fraser, i. 872; *Hislop*, 1878, Guthrie's Select Sh. Ct. Ca. ii. 205.

[11] *Macdonald*, 1903, 10 S.L.T. 578; *Paterson*, 1861, 24 D. 215.

cannot be relieved of their primary duty of adherence.[1] On the other hand, opinions have been expressed in support of the view that less misconduct than would found a decree of judicial separation may be a sufficient defence to an action of adherence.[2] In the case of *Mackenzie* the point was much discussed, but it was found unnecessary to decide it, and in the House of Lords judgment upon it was expressly reserved.[3] In the latest case in Scotland the question was still left open.[4]

296. Fraser expresses the opinion that it would be a good defence to the husband that the wife was pregnant by another at the date of the marriage, and had concealed this from him.[5] He founds upon a *dictum* to that effect by Sir John Nicholl.[6] This *dictum* is *obiter* and has never been followed in any judgment. Apart from the discretion which has been held to be conferred upon the Court by the Matrimonial Causes Act, 1884,[7] the preponderance of authority in England, both prior and subsequent to *Mackenzie's* case, appears to be in favour of the view that nothing will justify non-adherence except the commission of a matrimonial offence upon which the Court could found a decree of judicial separation.[8]

Section 4.—Jurisdiction.

297. An action of adherence is competent only in the Court of Session.[9] The Court will exercise jurisdiction on the same grounds as in an action of divorce for desertion. Accordingly the action will be entertained when the parties have their domicile in Scotland, and also where the deserting husband had his domicile there at the date of his desertion. It is not conclusively settled whether domicile is the only ground of jurisdiction. The opinion has been expressed in the House of Lords in an English case that in actions of separation and of adherence, residence of the parties within the territory may be sufficient.[10] It has been held in the Outer House that arrestment was sufficient to found jurisdiction in an action of adherence and aliment at the instance of a wife.[11]

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[1] *A. B.* v. *C. D.*, *supra* (interlocutor); Lord President Inglis in *Chalmers*, 1868, 6 M. at p. 550; *Mackenzie*, 1893, 20 R. 636, per Lord Rutherfurd Clark at p. 670; *M'Ewan*, 1908 S.C. 1263, per Lord Dundas at p. 1266.

[2] *Stevens*, 1882, 9 R. 730, per Lord Fraser; *Jolly* v. *M'Gregor*, 1828, 3 W. & S. at pp. 189 and 201, per Lord Eldon; Fraser, ii. 873; *Mackenzie*, *supra*, per Lord Trayner at p. 674.

[3] 22 R. (H.L.), per Lord Chancellor Herschell at p. 34, and Lord Watson at p. 41.

[4] *M'Ewan*, *supra*.

[5] Fraser, ii. 875.

[6] *Perrin*, 1823, 1 Add. 4.

[7] 47 & 48 Vict. c. 68.

[8] *Yeatman*, 1868, L.R. 1 P. & D. 489, per Lord Penzance at p. 491; *Green*, 1869, 21 L.T. (N.S.) 401; *Mason*, 1889, 61 L.T. 304; *Kennedy*, 1890, 62 L.T. 705; *Russell*, [1895] P. 315, per Lopes and Lindley L.JJ. at pp. 330, 331.

[9] 13 & 14 Vict. c. 36, s. 16; cp. 11 Geo. IV. and 1 Will. IV. c. 69, ss. 33 and 36.

[10] *Le Mesurier*, [1895] A.C. at pp. 527 and 531; and see Fraser, ii. 1294; Walton, H. & W., 2nd ed., 377; Duncan and Dykes on Jurisdiction, 178; cp. *Niboyet*, 1878, 4 P.D., per Brett L.J. at p. 19; Cotton L.J., p. 21; James L.J., p. 9; *Firebrace*, 1878, 4 P.D. 63.

[11] *Finlay*, 1885, 23 S.L.R. 583, per Lord Stormonth Darling.

ADHERENCE TO THE KING'S ENEMIES.

See CRIME.

ADJOURNMENT

IN CIVIL ACTIONS. *See* PROCEDURE.
OF TRIAL. *See* CRIME (PROCEDURE).

ADJUDICATION.

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Section 1.—Definition.

298. Adjudication is a diligence whereby (1) a creditor in a personal debt or obligation may attach the lands or other heritable property of his debtor, in satisfaction of, or in security for, his debt; or (2) the creditor in an obligation to convey lands or other heritage may obtain a judicial title thereto.

Section 2.—Adjudication for Debt.

Subsection (1).—*Early History.*

299. As a man's whole estate, heritable as well as moveable, is subject to the payment of his debts, it is only reasonable that his creditors should have right to attach his heritable estate for payment. Accordingly, all civilised nations seem to have made adjudication, or some procedure having the like effect, a part of their system of law. Under the Roman law, a creditor might sell his debtor's moveable estate, and if he failed to recover therefrom his whole debt, might then have recourse to his debtor's immoveable estate. Our ancient Scottish law followed the same lines. The Act, Alex. II. c. 24, provided that lands should not be seized in satisfaction of debt, so long as the debtor's moveables were sufficient for payment; and if cautioners were obliged to pay the debt, a proportional part of the debtor's lands was to be given to them.

General Authorities.—Graham Stewart on Diligence, 576; Bell's Com. (M'Laren), i. 739.

The Act, 2 Rob. I. c. 24, provided that moveables should first be distrained for debt. Failing moveables, the Sheriff was authorised to warn the debtor to sell his lands within fifteen days, on the expiry of which the Sheriff was empowered to sell so much of the lands as would pay the debt, interest, and expenses. If the lands were held of the King, the purchaser was entitled to be infeft by the Sheriff by royal charter. If held of a subject, the superior was given right to purchase the land ; but if he did not purchase, he was obliged on the Sheriff's precept to infeft the purchaser. The rights thus conferred upon the creditor were rights, not of security, but of sale ; and in like manner apprisings, which were the next stage of development, were at first proper sales of the debtor's estate, without any right of redemption. In this important respect they differed from adjudications, which superseded apprisings, and which, until the right of redemption is foreclosed, are mere securities for debt.

Subsection (2).—*Apprisings.*

300. The statute of James III., 1469, c. 36, provided that, failing moveables and rent, the King's letters might be obtained, under which a debtor's land might be sold by the Sheriff to the amount of his debts, and the creditors paid out of the proceeds. The debtor had right to redeem the land within seven years, on payment of the price and the expenses of the purchaser's entry. If within six months no purchaser was found, a portion of the land equal to the debt could be apprised by thirteen men chosen by the Sheriff, and the portion apprised by them was made over to the creditor. The superior was bound to receive the creditor on payment of a year's rent ; but he was entitled, if he chose, instead of receiving the creditor, to take the land and become liable himself for the debt. This statute, which was enacted for the benefit of creditors, had incidentally a most interesting and important effect upon the feudal law, by relaxing the rights of superiors, and compelling them to receive vassals, or else to become debtors to their vassal's creditor.

301. An apprising was thus truly a sale under reversion, and not, as an adjudication is now, a mere *pignus prætorium*. The appriser took over the property in satisfaction of his debt. He was entitled at once to enter into possession and to draw the rents. He was not bound to account for the rents, but might retain them, however large they might be in proportion to the debt ; and the principal sum remained due, and had to be paid by the debtor before he could redeem the lands. The diligence according to ancient law might thus be, and probably often was, most unjust to the debtor. It is not strange, therefore, that the Legislature in the seventeenth century intervened to prevent this injustice. The injustice, however, was not wholly towards the debtor, for if the creditor-appriser did not exercise his right of possessing the land and gathering the rents, the debtor might redeem, on payment of the bare principal sum, with the expense of diligence.

302. By the Statute 1621, c. 6, it was provided that the debtor could only redeem upon payment both of the principal sum and interest; even although the appriser had not possessed the lands. Further, where interest, the taking of which since the Reformation had been lawful, was due upon the debt, the principal sum and interest were accumulated by the decree into one sum, which carried interest until the lands were redeemed. It was also enacted that apprisers should have right to no more of the rents than corresponded to 10 per cent. interest on the debt. If they intromitted with the whole rents the surplus was to be devoted to payment of the principal, and when the amount of the intromissions exceeded the principal debt, with interest at 10 per cent. and the expenses of the apprising and entry, the apprising ceased to have effect and the lands reverted to the debtor. If, however, the rents did not amount to the interest, all the interest unpaid was a charge upon the reversion, and as the debtor was only entitled to redeem upon payment of the whole debt—principal and interest—it followed that, if the smallest part of either principal or interest remained due at the expiry of the legal, the whole subjects apprised might be carried irredeemably from the debtor. It is obvious that this statute altered the legal character of the apprising, for if the apprising could be extinguished by intromission with the rents, it was no longer an absolute right of property in the person of the appriser, but a mere *pignus prætorium* or judicial security for payment of debt. The appriser became, as it were, a steward for the rents of the apprised estate after the extinction of his debt, and was bound to account therefor to the debtor.

303. Another important step was taken by the Act 1661, c. 62. The Court of Session was authorised, on the suit of the debtor, to restrict the appriser's possession to such part of the lands as answered to the interest of the debt, on the debtor giving possession, or ratifying it if already taken. This statute also provided for the *pari passu* ranking of apprisings. All apprisings led before the first effectual apprising at any time, and all led within year and day after it, were to rank *pari passu*, the posterior appriser always satisfying the first effectual appriser of his whole expenses.

Subsection (3).—*Action of Adjudication.*

304. The Act 1672, c. 19, directed that adjudications should proceed against debtors by way of action before the Court of Session, instead of by the old form of apprising. Further, it provided for special adjudications, and enacted that such part only of the debtor's real estate was to be adjudged as should correspond to the principal debt and interest, with a fifth part more because the creditor had to take land instead of money, besides the composition payable to the superior and the expenses of the infeftment. The debtor was obliged to deliver to the creditor a valid right of the lands, renounce possession in favour of the adjudger, and ratify the decree of adjudication. The legal was five years, and the

rent of the lands adjudged was deemed to be in full of the interest on the debt. If, however, the debtor failed to produce sufficient title and to implement the decree of adjudication by giving quiet possession, the creditor might adjudge all right belonging to the debtor as he could have done by way of apprising under the Act 1661, c. 62. This Statute accordingly introduced *general* adjudications, in which the *legal* was ten years, the debtor's whole right was adjudged, and the creditor was not entitled to the additional one-fifth allowed in the special adjudication. Until the Lands Transference Act of 1847,[1] the general adjudication could only be libelled and concluded for as alternative to a special adjudication, but the necessity of so libelling was obviated by that Act, the provisions of which were re-enacted by the Titles to Land Consolidation Act, 1868.[2] A summons may now conclude for general adjudication alone. Special adjudications are obsolete.

305. The true nature of the diligence of adjudication was thus defined by the Statute of 1672, and the law of adjudication, with certain modifications, was established, so that subsequent legislation has altered it only in details. The simplification of the Scottish system of conveyancing, and the development of sequestration in bankruptcy, have in some degree detracted from its usefulness as a diligence, but as such it is still one of very great importance.

Subsection (4).—*Grounds of Adjudication.*

306. Adjudication proceeds only upon a liquid document of debt or upon a debt constituted by decree. The reason is that the precise sum may be known on the payment of which the debtor may redeem. The debt must be liquidated. Thus a decree of adjudication was held inept where the debtor was cited on the summons of adjudication before the decree of constitution had been extracted.[3] It is not enough that the rule or principle be fixed by which the debt may be reckoned.[4] So an adjudication led on a heritable bond against the heir of the granter of the bond was restricted to a security, because the adjudger had omitted to obtain a decree of constitution against the heir before leading the adjudication. The debt must not be prescribed or contingent. It must be a subsisting debt at the date of the adjudication. The term of payment must have come, but although it may not have come, the adjudication on equitable grounds may be allowed to proceed (1) when the debtor is *vergens ad inopiam*, or (2) if the creditor runs the hazard of losing his debt by other creditors adjudging year and day before him. A bill of exchange is *per se* a sufficient ground for adjudication. It need not be protested or registered.[5] If granted by a married woman, it would not formerly sustain an adjudication.[6] But an open account,

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[1] 10 & 11 Vict. c. 48.
[2] 31 & 32 Vict. c. 101, s. 59.
[3] *Mackay* v. *Watt's Crs.*, Dec. 11, 1800, F.C.
[4] Bell, Com. i. 739.
[5] *Ferguson* v. *Robertson*, Feb. 20, 1816, F.C.
[6] *Scott* v. *Scheniman*, 1818, Hume, 221.

though attested by the debtor, or a bare acknowledgment for borrowed money or other document which may warrant decree in a separate action for payment of the amount, is not a sufficient ground.[1] If the document of debt bear a clause of interest, or if interest be due *ex lege*, adjudication may proceed for arrears of interest without constitution. Every objection to the debt itself (*e.g.* want of authenticity of a voucher) is available against an adjudication.[2] It is no objection that the debt is compensated by another debt due by the adjudger, unless the debtor pleads, and can instantly verify, compensation. The debt must not only be due, but must at the time of adjudging be vested in the adjudger. But it may suffice, if his right come to him by succession, that his title be completed after the adjudication. The same indulgence, however, is not accorded to one who acquires right to the debt by assignation.[3]

Subsection (5).—*Constitution.*

307. A decree of constitution is necessary where the debt is not liquid; where there is no written document of debt of the nature indicated above; where the document is ambiguous or dependent on a condition; or where, though existing, it is not produced, or where it has been lost. A decree of registration will be a sufficient constitution, but should be accompanied by the bill or other document of debt. Where the creditor is uncertain of the amount of his claim—*e.g.* where it depends on a settlement of accounts not yet balanced—he should either (1) adjudge articulately for such sum as is certainly due, with a random conclusion for the uncertain sum, which will be available if it can be justified to the full amount; or (2) adjudge in security and obtain decree, reserving objections *contra executionem*. When the decree of constitution has been passed reserving objections, the adjudger must in competition support his action of constitution as libelled.

308. The action of constitution is a separate proceeding from the action of adjudication. In the adjudication the Court cannot try the authenticity of the debt nor admit it to proof. But the action for constitution may be combined with the action of adjudication in one summons if against an unentered heir.[4] Whether the two actions can be combined except in the case of an unentered heir, is at least doubtful.

309. A debt does not require constitution if made real by heritable bond or real burden. In such a case, however, if the adjudication is to proceed upon the *debitum fundi*, and not upon the personal obligation, if any, decree must first be obtained in an action of poinding of the ground. The adjudication will then proceed upon the debt and decree of poinding of the ground. The object of poinding the ground is to make the arrears of interest, which are moveable, real, and to accumulate interest, and make the accumulated interest and principal bear

[1] Parker's Notes on Adjudication, 12.
[2] Bell, Com. i. 739.
[3] Bell, Com. i. 742.
[4] 32 & 33 Vict. c. 116, s. 60.

interest and become a real burden.[1] See Adjudication on *debitum fundi* (*infra*).

SUBSECTION (6).—*Subjects of Adjudication.*

310. (*a*) *Subjects Adjudgable.*—The following subjects are adjudgable :—Heritage and heritable rights ; personal rights in lands ; a faculty or power, *e.g.* to reduce a deed, but not where an element of discretion enters into its exercise ; entailed estates during the debtor's lifetime, the proper course being to adjudge the lands themselves and not merely the debtor's liferent interest therein ; liferents ; reversions ; leases where judicial assignees are not excluded, and securities over leases ; dues of harbours, fairs, and ferries ; mines ; fishings ; the common good of a burgh ; heritable securities (see sec. 129 of the Titles to Land Act, 1868, sec. 65 of the Conveyancing Act, 1874, and secs. 24 (7), 44 (2) (*a*) and (*b*), and (5) of the Conveyancing (Scotland) Act, 1924 ; when the original creditor is dead, the executors or personal representatives, as well as the heir-at-law of the deceased, should be called) ; heritable bonds even before the term of payment, and though infeftment has not been taken ; personal bonds secluding executors ; a personal debt when a heritable subject such as a lease has been assigned in security ; a husband's interest *jure mariti* in the rents of his wife's lands when the marriage was contracted prior to July 18, 1881 ; stock of the Royal Bank and of the Bank of Scotland ; stock of chartered companies when arrestment is declared to be excluded, but not the shares of a company declared moveable by Act of Parliament.[2] In *Sinclair's* case it was contended for the pursuer that adjudication was competent because stock of the Royal Bank of Scotland had in a previous case been found to be adjudgable. But the answer was that arrestment had been excluded in the case of Royal Bank stock, whereas bank stock at common law was arrestable, and, being arrestable, adjudication was not the appropriate diligence.

311. A beneficiary's interest under a trust when that interest is heritable, *e.g.* a share of heritage as to which no direction to sell has been given, may be adjudged ; a creditor of a principal beneficiary under a lapsed trust may adjudge his interest under the trust ;[3] a creditor in an obligation granted by the trustees[4] can adjudge the heritage held in trust though held subject to a direction to sell. Any reversionary interest in the truster may be adjudged if heritable, and adjudication is the proper diligence for attaching the truster's radical right in a conveyance of lands *inter vivos* to trustees,[5] and also the donee's right under a power of appointment.

312. (*b*) *Subjects not Adjudgable.*—Offices of trust and titles of honour, unless such as passed either by voluntary conveyance or were

[1] Mackay, Manual, 518 ; Juridical Styles, 3rd ed., p. 202.
[2] *Sinclair* v. *Staples and Others*, 1860, 22 D. 600.
[3] *Gavin* v. *Kirkpatrick*, 1826, 4 S. 629.
[4] *Earl of Breadalbane* v. *Macdonald & Others*, 1824, 2 S. 621.
[5] *Campbell* v. *Crs. of Edderline*, 1801, Mor. App. Adjudication, No. 11.

so annexed to land that they were made descendible to the same heirs ; moveables and moveable rights ; a bond of annuity over a heritable estate declared to be alimentary ; arrears of rent or interest ; [1] a *spes successionis* ; the right of a substitute heir of entail to pursue a declarator of irritancy against the heir in possession ; the gaol, town house, and its bell ; the petty customs of a royal burgh ; [2] rights conferred for the discharge of a public purpose ; and lands taken by a railway and used for the purposes of their undertaking, or at least not proved to be superfluous,[3] are not adjudgable.

Subsection (7).—*Against whom Adjudication may proceed.*

313. "The estate of the debtor is in all situations liable to the diligence of his creditors, both during his life and after his death, unless it be held by him under such restraints as deprive his creditors of their remedy against it." [4] If the debtor be in life, he is of course the defender to the action of adjudication. If he be dead and leave no heirs, the action is against the Crown as *ultimus hæres*, the Lord Advocate being called as defender.[5] In this case a decree of constitution must be obtained before a summons of adjudication is raised. If the debtor be dead and have left an heir-at-law, such heir must be called as defender.

Subsection (8).—*Procedure.*

(i) *Former Procedure.*

314. The present procedure in such a case is simple, but for a proper understanding of it, the former procedure, which was extremely cumbrous, must be briefly considered. The problem was how to adjudge the estate of the ancestor, for his, the ancestor's, debt. There was no difficulty in solving this problem if the heir chose to enter to the ancestor's estate. In such a case the creditor constituted his debt, and then proceeded to adjudge the estate as if the heir himself had been debtor and proprietor. But if the heir did not choose to enter, either tacitly by assuming the general succession and behaving as heir, or expressly by making up his title, the creditor was obliged to give him two charges, namely, (1) *A general charge* to fix on him the representation generally, or to compel him to renounce the succession. If he renounced, decree was obtained not against him, but *cognitionis causa tantum*, whereby relief could be operated against the *hæreditas jacens* of the ancestor. The general charge was followed by an action of constitution raised against the heir, decree in which action, if not *cognitionis causa tantum*, made the debt his which was formerly his ancestor's. The debt being thus fixed against the heir, the next

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[1] *Broughton* v. *Fraser*, 1832, 10 S. 418.
[2] *Phin* v. *Magistrates of Auchtermuchty*, 1827, 5 S. 690.
[3] *Glover's Trs.* v. *City of Glasgow Union Railway Co.*, 1869, 7 M. 338. [4] Bell, Com. i. 711.
[5] 20 & 21 Vict. c. 44, s. 1 ; *Reid* v. *The Officers of State*, 1747, Mor. 1355.

step was to give him (2) *A special charge* to enter on the specific lands sought to be adjudged. If he disobeyed this charge, the creditor proceeded to adjudge the lands as if they were the heir's, and a summons of adjudication was raised calling upon the heir, and all others having interest, to hear and see the lands adjudged to belong to the creditor in payment of his debt. Instead of a special charge, the adjudger might give (3) *A general special charge*, which was the same in theory and effect as the special charge, but was appropriate when the title to the subjects to be adjudged had not been perfected by sasine in the person of the ancestor, or when the subjects were of such a nature as not to require sasine.

(ii) *Present Procedure.*

315. Letters of general charge or special charge or general special charge have not been competent since the Lands Transference Acts of 1847.[1] The provisions of these statutes were re-enacted by the Titles to Land Consolidation Act, 1868.[2] The present procedure is by two actions, one of constitution and the other of adjudication, both of which may be combined in one summons. The citation on, and execution of, each summons (or the combined summons) are equivalent to the former charges. The actions or the combined action may be raised on the expiry of six months after the date of the defender becoming apparent heir. As above stated, however, the combined action seems only to be competent against apparent heirs. When the heir was the debtor, if he had not entered as such, by the former procedure no general charge was required, but only a special charge, on the expiry of which the creditor might proceed to adjudge in ordinary form. Since the Conveyancing Act of 1874, a personal right to land vests in the heir by his survivance of the ancestor, and it is now unnecessary either in theory or in fact to do anything to fix the representation upon the heir, or to make the lands available for his debts, but, notwithstanding this, summonses of constitution and adjudication are brought in the same form as before the 1874 Act.

316. It must be kept in view that the heir is no longer liable for his ancestor's debts beyond the value of the estate to which he succeeds; that if an heir shall renounce the succession, the creditors have the same rights against the estate as upon a renunciation according to the law before the commencement of the Conveyancing Act of 1874; and that, when an heir has before renunciation intromitted with the ancestor's estate, he is liable for the ancestor's debts to the extent of such intromission but no further.[3] Moreover, the ancestor's debts are preferable to the debts of the heir, provided the creditors of the ancestor complete their diligence within three years of the ancestor's death.[4]

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[1] 10 & 11 Vict. c. 48, s. 16; 10 & 11 Vict. c. 49, s. 8.

[2] 31 & 32 Vict. c. 101, s. 60.

[3] 37 & 38 Vict. c. 94, s. 12.

[4] 1 Charles II. 1661, s. 24. [For forms, see Scots Style Book, vol. i. pp. 82 *et seq.*; Juridical Styles, 3rd ed., vol. iii. pp. 101 *et seq.*]

Subsection (9).—*In what Court Adjudications are competent.*

317. Adjudications *contra hæreditatem jacentem* [1] are probably competent in the Sheriff Court, but by the Act 1672, c. 19, which substituted adjudications for apprisings, the Court of Session is declared to be the only Court competent to adjudications, exclusive of all inferior judges ; [2] and the Sheriff Court Act of 1877,[3] extending the jurisdiction of Sheriffs to all actions relating to a question of heritable right or title where the value of the subject in dispute does not exceed the sum of £50 by the year or £1000 value, expressly excludes " actions of adjudication save in so far as now competent." The whole tenor of recent legislation points to adjudications as suitable for the supreme Court alone, *e.g.* the 159th section of the Titles to Land Consolidation Act, 1868, as to the important matter of litigiosity by registration of a notice of summons, plainly contemplates a summons in the Court of Session, as does also the Conveyancing (Scotland) Act, 1924. [4]

Subsection (10).—*Summons.*

318. The procedure in an action of adjudication is in most respects the same as in an ordinary action ; but the first motion is, as after explained, one for intimation. The form of summons is regulated by the Court of Session Act, 1850,[5] and relative Acts of Sederunt of October 31, 1850, and 1913 C.A.S. Book, C. i. Forms adapted to special circumstances may be found in the Style books.[6] There is no conclusion for expenses, adjudication being a diligence, but if the defender cause unnecessary opposition he may be found liable in expenses, decree for which will be separate from the decree of adjudication. The pursuer of the action will be the party in right of the debt, and he ought to complete his title to the debt, if he be not the original creditor, before raising the summons. If proceedings be taken by an assignee before the date of the assignation, they will be invalid, and the subsequent concurrence of the cedent will not validate them. But where the right of the adjudger comes to him by succession, the Court will sustain the proceedings.[7] So, when the debt is heritably secured, a title must be completed to it before raising action. An executor-dative may raise an adjudication, but he must obtain confirmation before extract.[8] It is competent for an assignee of several creditors to raise an adjudication for the common behoof, and each creditor can obtain an extract of the decree in so far as concerns his own debt. Two or more debtors who are conjunctly and severally bound for a debt, may be made defenders in the same summons of adjudication.

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[1] See section 3, *infra.*
[2] Ersk. ii. 12, 53 ; Bell, Com. i. 714.
[3] 40 & 41 Vict. c. 50, s. 8 ; 7 Edw. VII. c. 51, s. 5 (4).
[4] 14 & 15 Geo. V. c. 27, s. 44 (1), (2).
[5] 13 & 14 Vict. c. 36.
[6] Juridical Styles, 3rd ed., iii. 114 *et seq.*
[7] Bell, Com. i. 742.
[8] *Black* v. *Shand's Crs.*, 1823, 2 S. 118.

319. The citation on the summonses of constitution and adjudication being equivalent to the charges of the old law it is probably now incompetent to accept service, to hold the summons as executed, or to dispense with the *inducicæ*. The Court, however, may, in order to preserve the rights of creditors to rank *pari passu* with the first adjudger, and to enable him to obtain decree within year and day of the first effectual adjudication, dispense with the *inducicæ*, and allow the summons to be printed in the calling lists, or limit the time for the defender seeing the summons, or grant warrant for enrolling the cause before the Lord Ordinary, and remit to the Lord Ordinary with power to pronounce decree, reserving all objections *contra executionem*, and dispense with the reading in the Minute Book, and grant warrant for immediate extract *ad interim*.[1] A creditor seeking these indulgences must apply by petition to the Inner House. The same indulgences are accorded to pursuers of actions of constitution where there is a race of diligence. Thus decree of constitution was granted (reserving all objections) without making up a record, so as to enable a party to raise an adjudication, and to rank *pari passu* with other adjudgers.[2] In the same case it was decided that the Court might decern in an action of constitution in terms of the libel before closing the record, "to the effect of adjudication and reserving all objections *contra executionem*." The Court has dispensed with the *inducicæ* of a summons of wakening of an adjudication, in order to secure to the pursuer a *pari passu* preference with other adjudging creditors,[3] and has dispensed with the *inducicæ* of a summons of adjudication, and allowed it to be enrolled in the calling lists of the Outer House. The term for seeing it was limited to eight days,[4] and the procedure in other respects shortened.[5]

320. The summons is served and called in the usual way. Thereafter, in the case of a first adjudication, the pursuer must enrol the cause in the Lord Ordinary's Motion Roll, and crave an order for intimation, whereupon the Lord Ordinary will, as matter of course, pronounce an interlocutor in these terms:—"The Lord Ordinary, in respect it is stated that this is the first process of adjudication brought against the defender of the subjects libelled, appoints intimation to be made in the Minute Book and on the walls of the Parliament House, to all the other creditors of the defender, for the purpose and in the form prescribed by the Acts of Parliament passed thereanent." This intimation requires to be made in all actions of adjudication, whether defended or not, under pain of nullity of the decree.[6] But, while intimation must be given in the case of the first effectual adjudication, there need be no intimation of succeeding adjudications ranking *pari passu* with it; or at least the want of it does not make them inept.[7]

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[1] *M'Kidd* (*Petitioner*), 1890, 17 R. 547.
[2] *Bontine* v. *Graham & Ors.*, 1829, 8 S. 87.
[3] *Erskine* (*Petitioner*), 1822, 1 S. 377.
[4] *Scott* v. *Scott*, 1832, 10 S. 253.
[5] *Gregg* (*Petitioner*), 1839, 1 D. 544.
[6] 19 & 20 Vict. c. 91, s. 5; 54 Geo. III. c. 137, s. 9.
[7] *Mackenzie's Crs.* v. *Mackenzie's Crs.*, 1795, 3 Pat. App. 409.

321. The period of intimation is twenty sederunt days. On the expiry of these days, and upon certificate that the intimation required by the foregoing interlocutor has been made, and that the *inducie* have expired, decree of adjudication may be obtained in the Undefended Roll, if the action be undefended. Although, in consequence of the intimation not having been given, the decree is ineffectual, yet the adjudication may rank *pari passu* with a subsequent adjudication duly intimated and made first effectual, or the summons may be conjoined with any subsequent summons duly intimated. The purpose of intimation being ordered in this way is, as the statutes ordaining it shew, " that any other creditors of the common debtor who at the next calling of the cause can shew that, although they have not executed their summonses of adjudication, they are in other respects, by the nature of the grounds of debt and steps taken by them, in condition to proceed in adjudging the debtor's estate, may produce the instructions of their debts, with summonses of adjudication libelled and signeted, for the purpose of their being conjoined in the decree of adjudication." [1] If the first adjudication be defended, a second adjudger who wishes to be conjoined must await decree ; he cannot demand decree in his own action while the other is pending.[2] It is only with the first effectual adjudication, however, that there is room for conjunction, and any decree taken on a summons conjoined with a subsequent adjudication is bad.

322. Creditors who adjudge within year and day after the decree in the first effectual adjudication or at any time before it, may be ranked *pari passu* with the first effectual adjudication and those conjoined with it. Hence arises the expediency of posterior adjudgers obtaining the indulgences from the Court above referred to, so as timeously to lead their adjudications.

323. The necessity for obtaining the order of intimation above mentioned only obtains in adjudications for payment or in security, and not in actions of adjudication in implement, or in proceedings upon *debita fundi*. In the former case, the debtor is being compelled to implement a specific obligation with which other creditors have no concern, and in the latter case the adjudging creditor is merely making good his preference over ordinary creditors. The Court cannot dispense with this intimation in the case of a first adjudication, or pronounce decree during the currency of the twenty days even on a statement of urgent circumstances.[3] It may often be important to determine which is the first effectual adjudication. The summons first called is the first effectual, although decree is not obtained in it till after decree has been pronounced (in consequence of the *inducie* having been dispensed with) in an adjudication called posterior to it.[4] The subjects to be adjudged

[1] *Gregg* (*Petitioner*), 1839, 1 D. 544.
[2] *Forman* v. *Nicholson & Anr.*, 1832, 10 S. 365.
[3] *Badenoch & Anr.* (*Petitioners*), 1838, 16 S. 903.
[4] *Allison* v. *Ballantine*, 1805, Mor. App. Adjud., No. 14.

are set forth at length or by reference in the principal summons, and the description ought, of course, to be as correct as possible, but as creditors may not be supposed to know their debtor's property accurately, considerable latitude is allowed. Thus an adjudication of lands was found to carry the mines, and an adjudication of a tack of the lands of D and others, without mention of other particulars, has been sustained.

Subsection (11).—*Defences to Action of Adjudication.*

324. The defender may, of course, appear and state objections to the ground of debt or the regularity of the action. But as adjudication is a diligence, the Court will not readily interfere with the course of an adjudication, but will rather grant decree of adjudication, reserving all objections *contra executionem.* Thus it will not prevent decree that the ground of debt is under suspension or reduction, nor that a multiplepoinding has been raised to ascertain who is entitled to the debt. But a pursuer was held barred *personali exceptione* from adjudging on a heritable bond, although there had been a short delay in paying the interest, the fact being that on previous occasions he had made no objections to a similar delay.[1] The defence most commonly urged is *pluris petitio*, that the adjudication has been led for more than is due. In apprisings this objection was fatal, but in adjudications the Court does not deal so strictly as to set aside an adjudication *in toto* on this ground, unless the *pluris petitio* be very great, or have arisen from gross negligence or fraud. The effect will in general only be to restrict the adjudication to one in security for the true debt, in which case the legal will not expire. It has further been held that a *pluris petitio* in the conclusion of the summons will be allowed no effect if decree be taken only for the sum truly due.[2] Great care to secure accuracy as to the description of the grounds of debt, dates, and other particulars must be observed, as the debtor, although he may not defend the action of adjudication, may impugn the decree on these grounds subsequently, *e.g.* when the adjudger proceeds to make use of his decree by an action of maills and duties. Thus the writ on which, according to the old practice, a summons of adjudication proceeded bore that an assignation was dated 5th instead of 25th September. The error was repeated in the summons, but was attempted to be rectified after signeting. The decree of adjudication was held to be totally null and incapable of being sustained even as a security. But in the same case it was held that an inadequate stamp on a deed which formed the foundation of the decree of adjudication was not a sufficient ground for a reduction of the decree *in toto.*[3]

325. It is competent to restrict the summons to particular debts, or to particular portions of the lands. A decree of adjudication on

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[1] *Paterson* v. *Tod*, 1828, 6 S. 1062. [2] *Maxwell* v. *Maxwell*, 1743, Mor. 110.
[3] *Wilkie* v. *Flowerdew*, 1850, 12 D. 818.

summons and defences reserving all objections *contra executionem* for the purpose of giving the adjudger a *pari passu* ranking with other adjudgers, is merely interim, and accordingly, after the decree had been extracted, warrant was granted to retransmit the process to the clerk, so that the action might proceed in common form. Such a decree is only granted by the Court in exercise of its equitable jurisdiction, and is in no sense a decree on the merits, and it would be inequitable to the defender to hold it as final, and compel him to raise a suspension.[1] When the creditor adjudged on a bill, under deduction of the amount which he admitted to be due to the defender, while the defender alleged that the deduction should have been larger, decree was granted under reservation of all objections *contra executionem*. If the summons had been raised exclusively on the bill, without any admission of a *contra* account, the Court would not have allowed a question of accounting, but would have decerned as craved.[2]

326. After decree has been obtained, a state of accumulation in general requires to be prepared for transmission to the extractor along with the process. This state brings out the principal sum in the decree, interest thereon from the date of decree of adjudication, expenses of process, if any, and dues of extract, and brings out the total accumulated sum for insertion in the extract decree. The accumulation must not be brought down to a later date than that of the decree, and there should be deducted in the state any sum received to account of the debt before extract, as well as any sum expected from the use of other diligence, as arrestments or poinding. The creditor on a bond in which there were several joint-obligants, received a partial payment from the bankrupt estate of one of them, and then adjudged for the whole debt the estate of another of the obligants. The adjudication was restricted to a security for the balance, because he ought to have adjudged only for the balance.[3] If the amount expected is not certainly known, an estimate must be made of it, which should be so stated as to avoid *pluris petitio*. The creditor is not bound to take notice of any sum by way of compensation, for compensation does not operate *ipso jure*, and it is for the debtor to state the plea on his own behalf. When there are several separate grounds of debt, it is common, in order to avoid the danger of a *pluris petitio*, to accumulate each debt separately, so that a *pluris petitio* as to one may not affect the others. This is called Articulate Adjudication. But there may be an articulate adjudication where there is only one ground of debt, as when principal, interest, and penalty are separately stated, in which case an error will only affect the sum as to which it is made. It is competent and usual to conclude for interest on the accumulated sum.

327. In considering the possible defences to an action of adjudication, it must be kept in view that, although adjudication is in form an action,

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[1] *Freen & Ors.* v. *Beveridge*, 1833, 11 S. 711. [2] *Watt* v. *Wilson*, 1841, 3 D. 1149.
[3] *Campbell's Crs.* v. *Macleod*, June 17, 1801, F.C.

it is strictly and properly a diligence, and the Court cannot try the amount of the debt, or admit it to proof. That must be done in the action of constitution. The debtor, as we have seen, will not be entitled to plead compensation or retention, unless he can instantly verify the same, but if he can, he may resist the motion for intimation in the first effectual adjudication, which will not be allowed to proceed even to the effect of intimation being appointed.[1] "Intimation cannot be stopped unless the defender can show *instanter* that there are no grounds for adjudging, as if he produce a discharge of the debt. It is perfectly settled that the existence of a trust deed is no objection to a non-acceding creditor adjudging."[2] But the order for intimation, if made, does not preclude the debtor from insisting in all his defences, even though preliminary. Intimation of a first adjudication, proceeding upon a bill *ex facie* prescribed, was in one case ordered, notwithstanding the defender's objection that the bill was prescribed.[3] If the pursuer has taken decree for a random sum in the action of constitution, the adjudication will not be good unless in the ranking the debt can be supported. It is, of course, a good defence that the lands sought to be adjudged are not the property of the debtor, but if the debtor have the radical right to the lands, as when he has divested himself of the lands in favour of a trustee for creditors, the adjudication will be good.[4] With regard to the objection of *pluris petitio*, Bell[5] holds that the doctrine as settled is this, "that in cases of material *pluris petitio*, or culpable neglect, the adjudication is annulled, but where it is slighter, the only effect is to reduce the adjudication to a security for principal and interest without expenses or penalties." The *pluris petitio* is judged of by the accumulated sum as it appears in the decree of adjudication. Material omissions in the extract have been held to annul an adjudication.

Subsection (12).—*Litigiosity.*

328. Litigiosity[6] has been defined as an implied prohibition of alienation to the disappointment of an action or of diligence, the direct object of which is to attain the possession or acquire the property of a particular subject.[7] The effect of it is that when such action or diligence has been begun, and the necessary steps are taken to ensure publication, a purchaser is compelled to take the estate as it stands in the person of the seller, subject to the decree to be pronounced in the action, or the diligence then in dependence. The seller or debtor cannot by any alienation, after litigiosity has commenced, defeat the action or diligence

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[1] *Duke of Queensberry's Exrs.* v. *Craufurd Tait*, July 11, 1817, F.C.
[2] *Harrower's Trs.* v. *Erskine*, 1827, 5 S. 307 (per Lord Glenlee, p. 347).
[3] *Morrison* v. *Hamilton & Anr.*, 1836, 14 S. 1126.
[4] *Harrower's Trs.* v. *Erskine*, 1827, 5 S. 307.
[5] Bell's Com. i. 745.
[6] Stair, iii. 1, 18; Bankt. iii. 41; Ersk. ii. 11, 7; ii. 12, 16, 41, 65; iii. 6, 11; Bell, Com. ii. 144, 185; Shand, Pract. 276, 604, 692; Kames, Eluc. 121, Equity, 307, 395.
[7] Bell, Com. ii. 144.

which has been instituted against him, although litigiosity is not always necessary to bring about the same result.[1] The doctrine is based upon the maxim *Pendente lite nihil innovandum.*

329. Litigiosity in real actions for recovering the property or possession of lands did not require, according to our older practice, any registration in order to constitute it effectually. It arose as soon as the action or diligence had proceeded " so far as to be open to public observation." [2] The point of time at which the lands became litigious was not precisely defined ; the mere citation of the debtor was not in itself sufficient ; [3] but it was generally assumed that it arose as soon as the action was called in Court. It was therefore provided by Statute [4] that it should be competent to register in the General Register of Inhibitions a notice of any signeted summons of reduction of any conveyance or deed of or relating to lands, and in the Register of Adjudications (now the Register of Inhibitions and Adjudications) [5] a notice of any signeted summons of adjudication, or of constitution and adjudication combined, for debt, or in security, or in implement, in the form of Schedule RR of the Statute ; and it was declared that no summons of reduction, constitution, adjudication, or constitution and adjudication, combined, should have any effect in rendering litigious the lands to which such summons related, except from and after the date of the registration of the notice. In the same way lands may be rendered litigious, in cases where inhibition is competent, by registering a notice of inhibition, whether contained in a summons before the Court of Session or in separate letters, in the General Register of Inhibitions, provided the inhibition and execution are duly registered in the same register not later than twenty-one days from the date of the registration of the notice.[6]

330. The Conveyancing (Scotland) Act, 1924,[7] provides that no action, whether raised before or after the commencement of the Act relating to land or to a lease or to a heritable security, shall have the effect of making such land, lease or heritable security litigious until a notice relative to such action in the form of Schedule RR of the 1868 Act shall be registered in the Register of Inhibitions and Adjudications as provided by s. 159 of the last-mentioned Act ; and that no decree in any action of adjudication of land or of a lease or of a heritable security, whether pronounced before or after the commencement of the Act, and no abbreviate of any such decree shall be deemed to have any effect in making such land, lease, or heritable security litigious. In order to secure the benefit of litigiosity, therefore, registration in the appropriate Sasine Register of the decree of adjudication or other decree

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[1] *Marshall* v. *Callander Hydro. Co., Ltd.*, 1895, 22 R. 954 ; 23 R. (H.L.) 55.
[2] Bell, Com. ii. 144.
[3] *Morrison* v. *Allardes*, 1787, Mor. 8335.
[4] Titles to Land Consolidation (Scotland) Act, 1868, s. 159.
[5] Conveyancing (Scotland) Act, 1924, s. 44 (1).
[6] Titles to Land Consolidation (Scotland) Act, 1868, s. 155.
[7] 14 & 15 Geo. V. c. 27, s. 44 (2) (*a*) and (2) (*b*).

pronounced in an action creating litigiosity within six months of the date of the final decree is necessary.[1]

331. The same statute provides[1] that all notices of litigiosity registered in terms of s. 159 of the 1868 Act shall prescribe on the lapse of five years or at such earlier date as they would have prescribed according to the then existing law, and that all inhibitions and notices of litigiosity which relate to lands, leases or heritable securities, and which shall be first registered after the commencement of the Act, shall prescribe on the lapse of five years after the date on which they respectively take effect.

332. Litigiosity, even when completed, strikes only against voluntary deeds, and does not affect such as are granted in fulfilment of previous obligations. Where there is undue delay in prosecuting the action or diligence, the *nexus* created by litigiosity may be destroyed. Litigiosity used formerly to arise after the institution of a process of ranking and sale; but as that process has been superseded by the Bankruptcy Statutes, it is unnecessary to consider its effects.[2]

Subsection (13).—*Competition amongst Adjudgers.*

333. In competitions between adjudgers on the one hand, and purchasers from the debtor-proprietor on the other hand, preference is given in accordance with the priority of sasine. But it is otherwise in competitions between adjudgers themselves. In such competitions the law has always favoured as far as possible equality of ranking, and the Act 1661, c. 62, thus expresses the spirit of the law: "And because oftentimes creditors, in regard they live at distance or upon other occasions are prejudged and prevened by the more timeous diligence of other creditors so that, before they can know the condition of the common debitor, his estate is comprised and the posterior comprisers have only right to the legal reversion, which may and doth often prove ineffectual to them, not being able to satisfy and redeem the prior comprisings . . . . therefore it is statute and ordained that all comprisings . . . . before the first effectual comprising and after, but within year and day of the same, shall come in *pari passu* together, as if one comprising had been deduced and obtained for the whole respective sums contained in the foresaids comprisings; and it is declared that such comprisings as are preferable to all others in respect of the first real right and infeftment following thereupon, or the first exact diligence for obtaining the same, are and shall be holden the first effectual comprising, though there be others in date before and anterior to the same."

334. This statute has been interpreted to mean that what is known as "the first effectual adjudication" may not be the only effectual adjudication, but that all adjudications anterior to the first effectual adjudication, however long anterior, and all posterior adjudications

[1] 14 & 15 Geo. V. c. 27, s. 24 (7), and s. 44 (3) (*a*) and (5).

[2] Bell, Com. ii. 146.

within year and day of the first effectual adjudication, shall rank *pari passu*. To quote the words of Bell,[1] "the first effectual adjudication once constituted is the criterion of the *pari passu* preference. It becomes from that moment not merely a private diligence, belonging exclusively to the individual who uses it, but a general diligence in which every creditor who afterwards adjudges has an interest. In this view, it is not entirely at the disposal of the individual. Its quality of 'effectual' remains to complete the other adjudications, although the debt on which it proceeds may have been paid off and the adjudication of course extinguished as an individual diligence." But when a summons, after having been executed and intimated in terms of the statute, had been abandoned, the pursuer having accepted payment of his debt, a subsequent summons, which had been duly intimated, was held to be the first effectual adjudication with which others could be conjoined.[2]

335. Under the old law, it was often a matter of extreme delicacy and difficulty to decide which was the first effectual adjudication. Sasine certainly was not required, the matter being one between adjudgers. The statute above quoted provided that it should be sufficient that the creditor had used "the first exact diligence" for obtaining an infeftment. In the simple case a charge to the superior was sufficient, but there were cases where a charge was unnecessary, as when the debtor's right was personal, or when the titles of the superior were incomplete, or where the creditor adjudging was himself the superior; and accordingly the Legislature intervened to provide a method for completing the diligence more within the reach of the creditor. The Statute 33 Geo. III. c. 74, continued by 54 Geo. III. c. 137, and subsequent statutes, provided that "the presenting of a signature in Exchequer when the holding is of the Crown, or the executing of a general charge of horning against superiors at the market cross of Edinburgh, and pier and shore of Leith when the holding is of a subject, and recording an abstract of the said signature or the said charge in the Register of Abbreviates of Adjudications, shall be held in all time coming as the proper diligence for the purpose aforesaid."

336. The difficulties which have just been mentioned, and the remedial statute, are of little more than historical interest, seeing that the modern conveyancing statutes provide effectual means for the completion of a feudal title by merely recording the extract of the decree, with warrant of registration thereon, in the appropriate Register of Sasines.

337. The year and day begins to run from the date of the decree of adjudication. Where one adjudication was dated July 30, 1679, and another July 31, 1680, it was held that the year was not to be counted by the number of days, but by the return of the day of the same denomination of the next year, and that accordingly the two adjudications

[1] Bell, Com. i. 721.

[2] *M'Lean's Crs.* v. *Clerk and Ors.*, Mar. 5, 1802, F.C.

were to rank *pari passu*. An adjudger is entitled to the benefit of the *pari passu* preference, although his diligence has not entered the record. Reference has already been made to the necessity for intimation in the case of a first adjudication, such intimation being ordered by the Lord Ordinary upon the expiry of the *inducice* of citation. The purpose of such intimation is that other creditors may have warning, and may take steps to protect themselves ; but the result is, or may be, that the creditors take separate proceedings, to the great embarrassment of the debtor. The debtor may accordingly have an interest to prevent the order for intimation being pronounced ; but he will not succeed in preventing it, unless by instantly verifying a good counter-claim, or showing that he has obtained a discharge of the debt, and that there are no grounds for adjudging. If investigation and discussion are necessary, intimation will be ordered. If intimation be ordered, and other creditors appear, it is desirable to diminish as far as possible the expense of separate appearances and separate adjudications. With this view, any creditor who produces a signeted summons of adjudication may have his action conjoined with the first adjudication.[1] The first adjudication is the adjudication which is first called, not of necessity the one in which decree of adjudication has first been obtained. If there should be a fatal defect in the first adjudication, the defect will not prejudice creditors whose actions have been conjoined with it.

338. The death of the debtor does not alter the law as to *pari passu* preferences ; so that if, after the first effectual adjudication, the debtor die, any subsequent adjudication within year and day of the first will be entitled to rank *pari passu* with it. As, however, six months must now elapse from the date of death before the actions of constitution and adjudication can be raised, and as the heir may not renounce the succession, posterior adjudgers may not be able to adjudge within the year and day, and may thus lose the benefit of a *pari passu* ranking. To prevent this, the Court may allow these adjudications to proceed as if the heir had renounced. Adjudications led beyond year and day from the date of the first effectual decree, are preferred according to priority.

339. While, under the Conveyancing Act of 1874, a personal right to lands vests in the heir by mere survivance, yet the right which he takes is subject to the debts of his ancestor, and as the creditors of the heir have no better right than the heir himself has, they cannot compete with the creditors of the ancestor. The matter has been made the subject of legislation in Scotland by the Act 1661, c. 24, which proceeds upon the preamble that it is just that "every man's own estate should be first liable to his own debt before the debts contracted by the appearand heirs," and declares "that the creditors of the defunct shall be preferred to the creditors of the appearand heir . . . . and the real estate belonging to the defunct within the space of three years after

[1] 19 & 20 Vict. c. 91, s. 5.

the defunct's death." The Act thus requires that the ancestor's creditors shall have a preference only if they proceed within the three years following the ancestor's death. It further applies to heritable subjects indiscriminately, whether they be such *destinatione* or *suæ naturæ*. The Act applies in the case of an heir who succeeds by settlement, but not if he has been infeft during his ancestor's life.

340. The Act 1661, c. 24, in requiring that the defunct's creditors shall do diligence, has been interpreted to mean complete diligence, that is to say, the adjudication must be followed by infeftment within three years. According to Bell, inhibition would perhaps be held complete diligence. It is thought also that the Court might allow indulgence to the creditors by dispensing with the discussion of their debt in the action of constitution, reserving all objections *contra executionem*, and similar equitable indulgences, such as those accorded as above mentioned to creditors claiming a *pari passu* preference with the first adjudication. If the first effectual adjudication against the ancestor's estate be completed within the three years, the adjudger will have a preference over other creditors of the ancestor who adjudge beyond the three years, although within year and day of the first adjudication. Such tardy adjudgers must rank along with the creditors of both ancestor and heir, with whom they may be entitled to a *pari passu* preference. It would appear that the first effectual adjudication may be led by a creditor of the heir even within the three years, and that a creditor of the ancestor, likewise adjudging within the three years and within year and day of the first adjudication, may take the benefit of it.

341. In the case of a judicial sale, when such sale has been commenced at the instance of the apparent heir, or of a creditor of the ancestor, or of a creditor of the heir, the preference is preserved to the creditors of the ancestor who enter their claims in the ranking and sale within the three years. A second provision in the Act above mentioned (1661, c. 24) prevents an apparent heir from granting any right or disposition to the prejudice of his ancestor's creditors within a full year after his ancestor's death. This provision strikes at all conveyances or securities, such as sales for a full price or bonds for money lent. Creditors of the ancestor may plead the statute against the deed of the heir, although they have done no diligence and the challenge is not made till after the expiry of the three years. But this does not hold when there is a competition between the creditors of the ancestor and those of the heir. There is nothing to hinder a conveyance by the heir in favour of all the creditors of the ancestor. The heir, however, cannot convey to his own creditors, so as to defeat the diligence of the ancestor's creditors, within three years of the death of the ancestor.

Subsection (14).—*Completion of Title.*

342. The decree of adjudication supplies, in law, the want of a voluntary conveyance by the debtor. Where the property, though of a

heritable nature, does not require sasine to its transmission, it is fully vested in the adjudger (subject to the debtor's right of redemption) by the decree of adjudication alone. Where the property is feudal, and sasine is required, the right of the adjudger was completed formerly by sasine on a charter of adjudication from the superior.

343. Prior to the passing of the Lands Transference Act of 1847,[1] the creditor who had adjudged his debtor's land completed his title by obtaining a charter from the superior. In virtue of the decree, the creditor was entitled to obtain such a charter, and, if necessary, to charge the superior to grant him an entry. The charter closely resembled the charter of resignation, the only material difference being in the *quæquidem* clause, which bore in the charter of adjudication that the lands had been adjudged by the Court from the former owner, and decerned to belong to the creditor. With the charter of adjudication might be combined one of confirmation, if the debtor's title required it. The charter contained a precept of sasine, in virtue of which the adjudger completed his title in the ordinary way by instrument of sasine.

344. By the Lands Transference Act of 1847,[1] important changes were made in the method of completing the title. Formerly the title could only be completed through the superior, but by the Act of 1847 [1] the decree of adjudication contained warrant for infefting the adjudger, to be holden *a me vel de me*. In virtue of the decree the creditor could take infeftment, the result of which was that he held of the party adjudged from, until confirmation by the superior, in the same manner as if the party adjudged from had granted him a disposition with an obligation to infeft *a me vel de me*, and a precept of sasine, and he had been infeft on such precept.

345. The Titles to Land Acts of 1858 and 1860,[2] without affecting the right of the superior, enabled the adjudger to complete a real right to the subjects by recording the decree of adjudication, with warrant of registration thereon, in the appropriate Register of Sasines. The decree required no precept of sasine. It was made equivalent to a voluntary disposition by the person adjudged from, to the adjudger. If the person adjudged from had only a personal right, the decree transferred such right as he had, enabling the adjudger to complete his title by virtue of the procuratory of resignation, or precept of sasine, which were held as transferred to him by the decree.

346. By the Titles to Land Consolidation Act of 1868, s. 62,[3] and the Titles to Land Consolidation Amendment Act, 1869, s. 4,[4] the provisions of the Titles to Land Acts of 1858 and 1860 were re-enacted, but those sections were repealed by the Conveyancing Act of 1874, s. 62,[5] which declared that the words therein set forth should be deemed and taken to be the 62nd sec. of the Act of 1868. This section declares that a decree of adjudication shall in all cases, except where the subjects

[1] 10 & 11 Vict. c. 48.
[2] 21 & 22 Vict. c. 76; 23 & 24 Vict. c. 143.
[3] 31 & 32 Vict. c. 101.
[4] 32 & 33 Vict. c. 116.
[5] 37 & 38 Vict. c. 94.

contained in the decree of adjudication are heritable securities, be held equivalent to, and shall have the legal operation and effect of, a conveyance in ordinary form of the lands therein contained, granted in favour of the adjudger of the lands ; in virtue of which conveyance the adjudger may now complete a feudal title, either by recording the decree or expeding a notarial instrument upon it. When the person adjudged from has merely a personal right, a title can be completed by using the decree as the connecting link, and expeding and recording a notarial instrument, or now under the Conveyancing (Scotland) Act, 1924, s. 4,[1] by expeding and recording a notice of title. If the person who wishes to complete his title be not the original adjudger, he will complete his title as if he had acquired right to an ordinary conveyance, the decree being equivalent thereto.[1]

Subsection (15).—*Abbreviate of Adjudication.*

347. This is an abridgment or abstract of the decree of adjudication, made out and signed by the Extractor of the Court of Session at the same time as the extract of the decree. It contains in the case of adjudication for debt the names of the debtor and creditor, the lands adjudged, and the amount of the debt. In other cases the abbreviate is suited to the circumstances. It had its origin in the " allowance " or approval of the apprising under the old law. The allowance or decree was indorsed on the apprising, and signed by authority of the Court, so as to make it in effect a decree-conform. It was upon this allowance that the superior was charged to enter the appriser. By the Act 1661, c. 31, these allowances were to be recorded within sixty days, otherwise a posterior comprising, if first recorded, was to be preferred. By Regulations 1695, c. 24, and 1696, art. 3, abbreviates were ordained to be made of all adjudications after the manner of the former allowances. Abbreviates are now recorded within sixty days of the date of the decree of adjudication in the Register of Adjudications (now the Register of Inhibitions and Adjudications).[2] A certificate of the registration is written on the abbreviate. A copy of the abbreviate is appended to the extract of the decree, on which likewise the registration is certified.

348. The abbreviate in competitions is only of consequence in a question with posterior adjudgers. Failure to record it does not prejudice the adjudger in a question with the debtor ; but, in a question with other adjudgers, the want of it may cost the prior adjudger his preference. Although the abbreviate be not recorded, the adjudger can, by taking infeftment upon the decree of adjudication, obtain a preference over creditors adjudging subsequent to the infeftment, but always subject to the right of *pari passu* ranking of adjudgers who complete the like diligence within year and day of the decree of the first adjudication. If registration takes place within year and day of the decree in

[1] 14 & 15 Geo. V. c. 27.

[2] 14 & 15 Geo. V. c. 27, s. 44 (1).

the first effectual adjudication, it will preserve the right of *pari passu* ranking with that adjudication. By the Conveyancing Act, 1924, s. 44,[1] an adjudication is ineffectual unless an extract of the decree or an abbreviate has been recorded in the Register of Sasines. A recorded abbreviate completes the security where the rights are personal ; and in the adjudication of real rights it imparts, though no infeftment be taken, a right of *pari passu* ranking with the first effectual, if recorded within year and day of the date of the decree in the first effectual. In questions with the debtor himself, a recorded abbreviate is not essential.[2]

349. If the year and day are nearly elapsed, the Court may, on cause shown, dispense with the *induciæ*, and pronounce decree, reserving all objections *contra executionem*, so as to enable a creditor to record his abbreviate, and so to rank with the first effectual.[3] If the abbreviate has not been recorded in due time, the Court may pronounce a new decree before extract, so as to provide the adjudger with a new date from which the sixty days will run.[4] If an abbreviate has not been ordered when the decree was extracted, the Court may authorise one to be prepared and recorded.

350. Where the subjects adjudged are heritable securities, the completion of title was regulated by the 129th sec. of the 1868 Act ; [5] but that section was repealed by sec. 65 of the 1874 Act,[6] and the adjudger may now complete his title by recording either the abbreviate of adjudication or an extract of the decree in the appropriate Register of Sasines, in either of which cases he is in the same position as if an assignation of the heritable securities had been granted in his favour by the person whose estate is adjudged, and as if such assignation had been duly recorded in the appropriate Register of Sasines at the date of so recording such abbreviate or such extract decree. This enactment seems to apply whether the person adjudged from was infeft or not ; but if he was not infeft, there can be no objection to treating the decree as an assignation of an unrecorded conveyance, and completing the title by notarial instrument under sec. 23 of the 1868 Act. This is now provided for by the Conveyancing (Scotland) Act, 1924,[7] which enacts (sec. 4 (3)) that a person having right to a heritable security may complete a title thereto by recording in the Register of Sasines a notice of title in the form prescribed.

351. With regard to long leases, sec. 10 of the Registration of Leases (Scotland) Act, 1857,[8] provided that the recording of the abbreviate of adjudication in the register in which the lease is recorded shall complete the right of the adjudger to such lease, but the section is now amended by the Conveyancing (Scotland) Act, 1924, s. 27, which authorises the

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[1] 14 & 15 Geo. V. c. 44 (1).
[2] Parker on Adjudication, p. 43.
[3] *M'Kidd (Petitioner)*, 1890, 17 R. 547. See para. 319 *supra*.
[4] *Seton* v. *Glass*, 1750, Kilk. 18 ; *Stewart* v. *Forbes*, 1888, 15 R. 383.
[5] 31 & 32 Vict. c. 101.
[6] 37 & 38 Vict. c. 94.
[7] 14 & 15 Geo. V. c. 27.
[8] 20 & 21 Vict. c. 26.

recording in the Sasine Register of an extract of the decree of adjudication. The section applies equally to an adjudger of the lease or of a security over the lease, and apparently an assignee before registration may complete a title by recording a notice of title along with the extract.

Subsection (16).—*Redemption and Expiry of the Legal.*

352. The right acquired by the adjudger is not an absolute right of property. It is a mere judicial security or *pignus prætorium*, and not a sale under reversion, and the debtor has the right of redemption.[1] It has not the effect of an absolute conveyance, " so as to give the adjudging creditor of the superior a right to enter vassals." If the debt be extinguished by payment or by intromission with the rents, the debtor is entitled to have his estate back. His right of redemption may be foreclosed by the creditor taking the proper steps after ten years. This period of ten years during which the debtor may redeem is called *the Legal*, which is an elliptical expression for " the legal term of redemption." Upon the expiry of the legal, the adjudging creditor has it in his power to foreclose the debtor from exercising the right of redemption. This the creditor does by raising and obtaining decree in an action called a declarator of expiry of the legal, in which the adjudging creditor calls on the debtor to exercise his right of redemption, otherwise to have it judicially declared that his right is foreclosed. After the action is raised, the debtor may require the adjudger to account for his intromissions with the rents, so that the sum may be ascertained on payment of which he may redeem the lands. Even after the legal has expired, the right is redeemable until decree that it has expired is pronounced.[2] After decree, however, the right of redemption is absolutely at an end.

353. It must be kept in view that decree, if obtained in absence, may be set aside on proof that the debt was really paid or extinguished within the legal, and also if there be any material objection in the original diligence of adjudication, or any irregularity in the action or decree, or in the action of declarator of expiry of the legal. If the adjudger, after decree, finds that his debt has not been extinguished, his right of action still subsists for the balance due ;[3] and, on the other hand, when the adjudication has been restricted to a security, the adjudger must account for his intromissions as well after as within the legal.[4] A decree of expiry of the legal may be opened up, as where the debtor was at the time abroad, and during part of the legal a minor ;[5] or it may be reduced, but the right to reduce will be barred by the negative prescription.[6] The debtor has right to redeem at any time before decree of

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[1] *Grindlay* v. *Drysdale and Anr.*, 1833, 11 S. 896 ; *Cochrane* v. *Bogle & Co.*, 1849, 11 D. 908 ; affd. 1850, 7 Bell's App. 65.

[2] *Govan* v. *Govan*, 1758, 2 Pat. App. 27.

[3] Shand's Practice, 717.

[4] *Walker* v. *Macpherson & Forrester*, 1720, Mor. 302.

[5] *Aitken* v. *Aitken*, Jan. 1809 ; Bell, Com. i. 744, n. 1.

[6] *Paul* v. *Reid*, Feb. 8, 1814, F.C.

declarator of expiry of the legal ; but this rule is subject to another, which is equally well settled, that an adjudication followed by charter and sasine, or the modern equivalent thereof, and by forty years' possession after the expiry of the legal, is not redeemable.[1] But the mere expiry of the legal does not vest the estate in the creditor *ipso jure*, even when there has been possession for forty years. Either decree of declarator of expiry of the legal must be obtained, or there must be possession for forty years upon charter and sasine or its modern equivalent.

354. As an adjudication without declarator of expiry of the legal is not an *ex facie* valid irredeemable title, sec. 34 of the Conveyancing Act of 1874 and sec. 16 (1) of the Act of 1924 do not apply to the case, and therefore the full period of forty years' prescription is required. Once acquired, the absolute right operates *retro*, so that an entail became effectual which was executed by the adjudger before declarator of expiry of the legal.[2] Minorities must be deducted.[3] A decree of adjudication not followed by possession is liable to the negative prescription, but sasine upon the decree interrupts the prescription.[4] Bell [5] thus states his view of the result of the case of *Gedd* [6] : "(1) That within the forty years it was competent to prove payment or satisfaction of the debt within the legal ; (2) that the expiration of forty years after sasine saved the creditor-adjudger from any challenge on the ground of objection to the sasine ; and (3) that it would require the expiration of forty years from the end of the legal term to secure the creditor-adjudger from all challenge."

Subsection (17).—*Extinction.*

355. It is laid down by Erskine [7] that adjudications may be extinguished *ipso facto*, without the necessity of any decree of declarator, by the creditor's intromissions during the currency of the legal with the rents of the lands adjudged, or by payments in full made by the debtor, or by others on his account, and it is unnecessary on redemption that the debtor should be again infeft ; the reason being thus stated by Erskine, that an adjudication is the sale of lands to a creditor redeemable by the debtor upon payment. And as all redemptions operate *retro*, so as to avoid the sale as if it had never existed, the debtor's seisin must revive and recover all the force that it had originally before the apprising was led. But even if this be so, it is competent for the debtor, if he believes the creditor-adjudger has been paid by his intromissions, or if he wishes to pay any balance to the creditor, to raise an action of declarator of extinction and payment, or of reduction and extinction. In this action the pursuer [the defender in the other action], must offer to pay the

[1] *Spence* v. *Bruce*, Jan. 21, 1807 ; Bell, Com. i. 745, n. 5.
[2] Bell, Prin. s. 831. [3] *Aitken* v. *Aitken*, Jan. 1809 ; Bell, Com. i. 744, n. 1.
[4] *King* v. *Walker and Ors.*, 1828, 6 S. 643. [5] Bell, Com. i. 706.
[6] 1740, Mor. 10789. [7] Erskine, ii. 12, 37.

balance, if any, due to the creditor, including the principal sum and interest, and the whole expense of diligence incurred by the creditor in recovering the debt, together with the salary to the factor, if one has been employed for collecting the rents.[1] The heir of the person last infeft is entitled to redeem. In estimating the sum required for redemption, the Act 19 & 20 Vict. c. 91, s. 5, must be kept in view, which provides that "in all cases where penalties for non-payment over and above performance are contained in bonds or other obligations for sums of money, and are made the subject of adjudication, or of demand in any other shape, it shall be in the power of the Court to modify and restrict such penalties so as not to exceed the real and necessary expenses incurred in making the debt effectual."

356. As the debtor has an interest to have an adjudication of his lands extinguished, so a postponed adjudger may have an interest to extinguish an adjudication prior to his own. In such a case, however, the adjudication is not strictly extinguished. The right to it is only transmitted from one creditor to another. In order to the proper extinction of the adjudication, payment must be made by the debtor, or by others on his account, either to the original adjudger or to his assignee.[2] In any challenge of an adjudication, the warrants, by which are meant general and special charges and other preliminary steps of proceeding, cannot be called for after twenty years, but the grounds of debt, such as bonds, bills, contracts, assignations and decrees of constitution, must be produced at any time within the years of prescription; the reason for this being stated to be, that although they are the warrants, they are not the grounds of the decree, and that they are not parts of the title of the pursuers, but evidence of the passive title against the defenders.[3]

357. Erskine points out the insecurity of the right of a singular successor who purchases an adjudication, for the adjudication may have been extinguished by the adjudger's renunciation or discharge, which need not be registered, or by his intromission with the debtor's effects, which cannot be registered; or the sasine which has proceeded on the adjudication purchased may possibly be a common right to support other adjudications led within year and day. The debtor may prevent the legal from expiring, and preserve his right of redemption, if during the legal he intimates his desire to pay the debt and consigns the sums due. So an action of count and reckoning and declarator of extinction, brought within the legal by the debtor, keeps open the right of redemption.[4]

Section 3.—Adjudication contra hæreditatem jacentem.

358. A creditor can adjudge his debtor's estate, after the debtor's death, either by proceedings against the heir, or, if the heir renounces

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[1] Erskine, ii. 12, 38.
[2] *Ibid.*, ii. 12, 37.
[3] *Irvine* v. *E. of Aberdeen*, 1776, Mor. App. Tailzie, No. 1, affd. H.L. 1777, 2 Pat. App. 419.
[4] *Kincaid* v. *Gordon*, 1677, Mor. 289.

the succession, against the *hæreditas jacens* of the debtor. The Act 1540, c. 24, provided that an heir of full age who remained unentered for year and day after his predecessor's death, might be charged by a creditor in a liquid debt to enter within forty days. If he failed to do so, the lands might be apprised, the apprising to be as effectual as if the heir were entered. The apprising was subject to the right of the heir and his successors to redeem within seven years. By the Act 1621, c. 27, the former Act was ratified, with the addition that the right to redeem within seven years was extended to other creditors of the deceased debtor, and that the creditors of the heir as well as those of the defunct might charge an apparent heir to enter for a debt due by him just as he might for one due by his predecessor. The right of an heir's creditors to adjudge his ancestor's lands was, however, postponed by the Act 1661, c. 88, to that of creditors of the ancestor who did complete diligence within three years of the ancestor's death.

359. The Act 1672, c. 45, which abolished apprisings, and substituted adjudications in the Court of Session in their room, was held by the Court not to include adjudications *contra hæreditatem jacentem*, which adjudications have accordingly always been competent before the Sheriff, as well as before the Court of Session. It is believed, however, that in practice they have been little used in the Sheriff Court.[1]

360. There is this difference between such adjudications when led in the Court of Session and in the Sheriff Court respectively, that in the former case, by Regulation of 1696, art. 3, abbreviates, which had previously not been required, were introduced, while in the latter they have never been introduced by statute. It seems, however, to have been the practice, when such actions were led in the Sheriff Court, to issue abbreviates signed by the Sheriff, and to record them in the Register of Adjudications. Under the former law, after the general charge, and after the special or general special charge, as the case might be, decree of adjudication was pronounced against the heir and against the estate of the ancestor. But if the heir appeared and renounced the succession, the decree pronounced against the heir was *cognitionis causa tantum*, and the decree of adjudication was against the *hæreditas jacens* of the ancestor. The combined action of constitution and adjudication, which is now competent, contains an alternative conclusion, in the event of the heir renouncing, for a decree *cognitionis causa tantum* and adjudication of the *hæreditas jacens*.[2]

361. Notwithstanding opinions to the contrary, it is thought that the Conveyancing Act of 1874, ss. 9 and 12, does not alter the law as to adjudications *contra hæreditatem jacentem*. It is true that a personal right vests in the heir by mere survivance of the ancestor, but sec. 12 has only the effect of limiting the heir's liability to the value of the

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[1] Sheriff Courts Act, 1877 (40 & 41 Vict. c. 50), s. 8; Sheriff Courts Act, 1907 (7 Edw. VII. c. 51), s. 5 (4).

[2] 31 & 32 Vict. c. 101, s. 60.

estate to which he succeeds, and to that extent only is the heir liable. The liability for the ancestor's debts being thus fixed upon the heir, the 12th sec. goes on to provide that if the "heir shall renounce the succession, the creditors of the ancestor shall have the same rights against the estate as upon a renunciation according to the law before the commencement of" the Act.[1] The Act accordingly seems to recognise a renunciation by the heir after the Act, as before it, and provides that the consequences of the renunciation shall be the same after as before the Act. The legal in these adjudications still continues to be seven years.

Section 4.—Adjudication on debita fundi.

362. Adjudications are competent upon *debita fundi* such as heritable bonds, ground annuals,[2] duties due to superiors, debts constituted real burdens upon land, whether by constitution or by reservation. If there be a valid personal obligation as well as a heritable bond, the adjudication may proceed upon such obligation. The advantage of proceeding upon the personal obligation is that the adjudication will embrace all the lands of the debtor, whereas if it proceeds upon the *debitum fundi* alone, it will be confined to the security subjects. The disadvantage of proceeding upon the personal obligation, however, is that the adjudication will have no preference over other adjudications proceeding upon ordinary unsecured debts.

363. Adjudications upon *debita fundi* were expressly excepted from the *pari passu* ranking of apprisings under the Act 1661, c. 62, and intimation of the action in terms of that and subsequent Acts[3] is unnecessary.[4] But they are entitled to the natural preference which they have as real debts. Thus, in a competition amongst adjudgers, they are preferable to adjudications upon personal debts, and they are preferable *inter se* according to the priority of infeftment. But while this is so, the creditor in them has no preference for arrears of interest before the adjudication. He will naturally, as other adjudgers do, accumulate interest with the debt, so that the two may bear interest in the adjudication, but he will have no preference over other adjudgers for the interest of the accumulated sum, which interest is not a real but a personal debt, being interest upon interest. He can, however, secure a preference for arrears of interest by converting these arrears into a real debt. This he can do by obtaining decree in an action of poinding of the ground. Having obtained this decree, he can raise an action of adjudication, proceeding upon the debt as the ground, and the decree as the warrant. The decree on the adjudication will then give him a preference for the accumulated sum, which has thus been converted into a real debt. An action of adjudication is competent in the Sheriff

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[1] 37 & 38 Vict. c. 94, s. 12.
[2] 14 & 15 Geo. V. c 27, s. 23 (5) and (6).
[3] 54 Geo. III. c. 137, and 19 & 20 Vict. c. 91, s. 5.
[4] *Young* v. *Scott*, 1893, 1 S.L.T. 15.

Court of the county in which the lands out of which it is payable are situated if the amount of the ground annual is less than £2, 10s. per annum, and is in arrears for two years.[1]

Section 5.—Adjudication in Security.

364. Adjudication in security may sometimes be used on debts constituted by writing the terms of payment of which have not yet come.[2] And when the debt, though proved by written voucher or decree, is future or contingent, the creditor may sometimes adjudge in security.[3] All actions of adjudication may, if the creditor desires, be restricted to a security ; and where the debt is a random sum, as when the creditor has obtained in the action of constitution decree reserving all objections *contra executionem*, the creditor ought to take decree for satisfaction and payment of what he considers is certain, and a decree in security for what he considers the uncertain portion of the debt, so as to avoid *pluris petitio*.[4] When the debtor is *vergens ad inopiam*, the creditor may adjudge in security of his debt, although the term of payment is not yet come ; and a cautioner threatened with distress may adjudge in security for what he may ultimately be called upon to pay, provided the creditor has not also been adjudged and ranked for the same sum.

365. This adjudication, when it is the first, requires to be intimated like other adjudications. There is no legal term of redemption ; the debtor may redeem at any time. In other respects adjudication in security is obtained and completed in the same way as an ordinary adjudication for debt, but the grounds for craving the Court to adjudge in security should be specifically stated.[5]

Section 6.—Adjudication on a Trust Bond.

366. This was an expedient devised by Sir Thomas Hope to enable an heir to establish his title to his ancestor's estate without incurring either liability for his ancestor's debts, or becoming liable to implement a particular obligation of his ancestor's. It may have been useful at a time when an heir who did not renounce the succession incurred liability for the full amount, whatever it might be, of his ancestor's debts. But it is now unnecessary and obsolete. The procedure was that the heir granted a bond in favour of a friend whom he could trust for the full amount, or even more than the full amount, of the estate. The understanding between him and the grantee of the bond was that the grantee should adjudge the estate in virtue of the bond, and should then either challenge competing claims for the benefit of the heir, or should assign

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[1] 14 & 15 Geo. V. c. 27, s. 23 (5) and (6).
[2] Erskine, ii. 12, 42.
[3] *Creditors of Wallace* v. *Brown*, 1781, Mor. 62.
[4] *Creditors of Macneil* v. *Saddler*, 1784, Mor. 122. See *supra*, para. 326, *et seq.*
[5] *Duke of Queensberry's Exrs.* v. *Tait*, July 11, 1817, F.C.

the adjudication to the heir, who would then himself be in a position to challenge these claims. By this expedient he established his rights as heir without incurring the liabilities of an heir.[1] The heir completed his title upon the adjudication, but if, instead of doing so, he completed his title as heir, he was held to have abandoned his adjudication, which thereby became ineffectual as a step to a title.[2]

Section 7.—Adjudication on a Trust Disposition.

367. It was attempted to secure the advantage of adjudication upon trust bond by granting, instead of a bond, a trust disposition, with the understanding that the disponee should lead an adjudication in implement upon the disposition. This device was, however, discountenanced by the Court.[3]

Section 8.—Adjudication in Implement.

368. Adjudication in implement is defined by Bell to be "a form of legal diligence by which the want of a complete voluntary title to land or other heritage is judicially supplied to those who hold a disposition or other conveyance without a precept or procuratory, or who hold an obligation entitling them to demand a full conveyance of any particular subject."[4] It originated *ex nobili officio* of the Court at an early period and was in use long before the Act of 1672. When a party has obliged himself to convey lands by missives of sale, and refuses to convey voluntarily in implement of his obligation, an action of adjudication in implement may be raised against him, the decree in which adjudges the lands from the obligor, and declares them to belong to the obligee. So lands could be adjudged by the disponee of one who had granted a disposition without procuratory of resignation or precept of sasine. In like manner when a party obliged himself to grant heritable security for a loan, lands agreed to be given in security could be adjudged in security;[5] or when an heir of entail incurred an irritancy, the next heir to whom the estate was forfeited might have the lands adjudged, subject to the conditions of the entail.

369. The action may be directed against the obligor if in life, or if he be dead, against his heir, or if he have no heir, against the Crown as *ultimus hæres*. The procedure against the heir to implement his ancestor's obligation is the same as in adjudication for debt. Before the Lands Transference Act of 1847, it was by letters of general charge, action of constitution, letters of special or of general special charge, followed by action of adjudication. Since 1847, and now under the Titles to Land Consolidation Act, 1868, the proceeding is by actions of constitution and adjudication, or by combined actions of constitution

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[1] Menzies, Conveyancing, 807.
[2] *Bellenden* v. *Lady Kerr's Trs.*, 1823, 2 S. 369.
[3] *Dunlop* v. *Inglis Cochrane*, July 4, 1820, F.C.; affd. 1824, 2 Sh. App. 115
[4] Bell, Com. i. 783.
[5] *Macgregor* v. *Macdonald*, 1843, 5 D. 888.

and adjudication. There is no room in actions of adjudication in implement for *pari passu* ranking under the Act 1661, c. 62, because it is not an action for payment of debt, and therefore no intimation for twenty days is required, as in other adjudications; nor is there any room for legal reversion (unless, indeed, such be the nature of the obligation to be implemented),[1] because the purpose of the action is to carry the subjects to the obligee as irredeemably as they would have been if the obligation had been implemented by a voluntary deed. The effect of the decree is prescribed by s. 62 of the Titles to Land Act of 1868,[2] and sec. 4 of the Amendment Act of 1869,[3] as amended by the 62nd sec. of the Conveyancing Act of 1874,[4] which statutes also regulated the methods of completing the adjudger's title until the date of the Conveyancing (Scotland) Act, 1924.[5] The effect of the decree and the methods of completing title are the same as in adjudication for debt.

370. If there be more than one adjudication in implement at the instance of different parties, the first completed by registration in the Register of Sasines will be preferred, even though the decree on which it proceeded be subsequent in date to the other decrees. If two competing adjudgers obtain decree in implement of the same date, Bell [6] is of opinion that the equity which introduced the process of adjudication in implement demands that they "should be conjoined in one complex adjudication, and the subject either sold or divided for their benefit. Truly they are nothing more than creditors, for while no real right or *jus in re* has been constituted, the *jus ad rem* that each enjoys, resolving into a mere action, makes them proper personal creditors."

371. In a competition between an adjudger in implement and an ordinary adjudger for debt, if the ordinary adjudger completes his security by sasine, he will be preferred, and all others who complete their adjudications within year and day of him. "The subject is already attached preferably for the benefit of all who come within year and day, and the adjudger in implement may still adjudge as a common creditor for damages." [7] It is at least doubtful whether adjudications in implement are competent in the Sheriff Court.[8]

Section 9.—Declaratory Adjudication.

372. This was a form of action of considerable utility in the law, and expressly recommended by the Court.[9] It was useful in a variety of cases, as where property, though feudally vested in one, really belonged to another, who desired his right to be declared, and the estate to be adjudged to him as his own property; or where an estate was vested

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[1] *Watson* v. *Wilson*, 1868, 6 M. 258.
[2] 31 & 32 Vict. c. 101.
[3] 32 & 33 Vict. c. 116.
[4] 37 & 38 Vict. c. 94.
[5] 14 & 15 Geo. V. c. 27.
[6] Bell, Com. i. 749–50; but see *Wright* v. *Murray*, 1821, 1 S. 92.
[7] Bell, Com. i. 749–50.
[8] Shand, Pract. ii. 724.
[9] *Dalzell* v. *Dalzell and Anr.*, 1756, Mor. 16204; for Forms, see Scots Style Book, i. 80.

in trustees who had completed a title and had all died, and the beneficiary desired to have his rights declared and the estate adjudged to him; or where a judicial factor appointed upon the estate of a deceased person required to complete a title to that estate. It has, however, been in great measure superseded by simpler modes of completing title. Thus by the Titles to Land Act, 1858,[1] a judicial factor, instead of leading a declaratory adjudication, might petition the Court for warrant to complete a title to specified lands, and the warrant granted had the legal effect of a disposition in favour of the factor from the person whose estate was under management—at all events when that person's title was complete (see also Titles to Land Act, 1860;[2] Titles to Land Consolidation Act, 1868;[3] the Amendment Act of 1869;[4] and the Conveyancing Act of 1874[5]); and beneficiaries under a lapsed trust, when entitled to any heritable property, may, under the Trusts (Scotland) Act, 1867,[6] (now superseded by sec. 24 of the Trusts (Scotland) Act, 1921[7]) apply by petition for authority to complete title.

[1] 21 & 22 Vict. c. 76, s. 21.
[2] 23 & 24 Vict. c. 143, s. 38.
[3] 31 & 32 Vict. c. 101, s. 24.
[4] 32 & 33 Vict. c. 116, s. 3.
[5] 37 & 38 Vict. c. 94, s. 44.
[6] 30 & 31 Vict. c. 97, s. 14.
[7] 11 & 12 Geo. V. c. 58.

ADJUNCTIO.

See PROPERTY.

ADJUSTMENT

See AVERAGE; INSURANCE (MARINE).

OF RECORD. *See* PROCEDURE.

AD MEDIUM FILUM.

See BOUNDARIES AND FENCES; WATER RIGHTS.

ADMINICLES.

See PROVING OF THE TENOR.

ADMINISTRATION, RIGHT OF.

See HUSBAND AND WIFE.

ADMINISTRATION, LETTERS OF.

See CONFIRMATION OF EXECUTORS.

ADMINISTRATOR IN LAW.

See HUSBAND AND WIFE; MINORS AND PUPILS; PARENT AND CHILD; TUTORS AND CURATORS.

ADMIRAL, THE LORD HIGH.

See ADMIRALTY; OFFICES AND DEPARTMENTS OF STATE.

ADMIRALTY.

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Section 1.—The Court of Admiralty.

Subsection (1).—*History of the Court.*

373. The Court of Admiralty exercised the judicial functions of the Admiral of Scotland. The precise date of its establishment and its early history are uncertain. Originally it required to be "fencit and haldin within the flude mark of the sea,"[1] *i.e.* within the actual bounds of the Admiral's jurisdiction, but at an early date it began to sit regularly in Edinburgh, probably in the Tolbooth. Its earliest records are the *Acta Curiæ Admirallatus Scotiæ*, 1557–1562, now preserved in the Register House. In 1567 it is referred to as one of the Courts permanently situated in Edinburgh,[2] and a table of fees authorised for its use by the Privy Council in 1606 shew that it was then a regularly constituted Court with its own officers and forms of process.[3] At first the Admiral presided in Court in person, but at an early date he acquired the right of appointing a depute-judge, known as the Judge Admiral, who received his commission directly from him. The jurisdiction of the Court was at once civil, criminal, and in prize.

Subsection (2).—*Civil Jurisdiction.*

374. Its civil jurisdiction doubtless originated, as appears to have been the case in England, in the trial of cases of "spoil," *i.e.* of claims brought by or against foreign sovereigns for the restitution of ships or goods captured at sea, in which the common law courts were unable to give proper redress.[4] Its procedure was essentially summary and ex-

[1] Balfour's Practiques: Sea Laws, c. lxxxiv.
[2] Act 1567, c. 50.
[3] Reg. of Privy Council, 1604–1607, vol. vii. p. 175.
[4] *Cf.* Select Pleas of the Admiralty, vol. i. p. xiv.

peditious, and it applied not the common law of the realm but the general maritime law. Being derived directly from the Crown its jurisdiction was of a peculiarly equitable character, and it was regarded as the appropriate tribunal for foreigners who were outwith the jurisdiction of the common law courts and under the protection of the Crown. In claims by or against foreigners it adopted and applied the Law Merchant much earlier and more fully than the common law courts. For these reasons it soon became popular as a commercial tribunal, and at an early date acquired a wide jurisdiction not only in proper maritime causes, but also by usage in claims of a general mercantile character.

375. Throughout its history the jurisdiction of the Court of Admiralty was in conflict with that of the common law courts.[1] This conflict may be attributed to two causes. It was the theory of Scots law that a definite region of maritime territory, limited only by the range of vision, lay within the realm and was subject to the common law.[2] Accordingly, when, in 1532, the Court of Session was established by James V. to be "ane permanent ordour of justice for the universal wele of all his lieges,"[3] it was maintained that its jurisdiction was intended to include the maritime territory and to supersede that of the Admiral. In the second place, the distinction between maritime causes, in which the Court of Admiralty claimed to have an independent jurisdiction, in any event in the first instance, and merely mercantile causes, in which the superior jurisdiction of the Court of Session was admitted, was never clearly defined, and for this reason the Court of Session was able to advocate to itself both maritime and non-maritime causes alike.

376. In 1609 the jurisdiction of the Court was extended. Hitherto it had required a decreet conform by the Court of Session to enable execution to proceed on its decreets, but by the Act 1609, c. 22, it was declared that it was a "souverane judicatorie," and it was provided that hornings might pass on the decreets of the Admiral without the concurrence of the Court of Session. It has, however, been pointed out that the declaration that the Court was a "souverane judicatorie" did not necessarily imply that it was independent of the Court of Session, but merely that it had the power of reviewing its own decreets and those of its depute judges.[4] In any event the practice of advocating causes to the Court of Session continued as formerly.

377. In 1681 a further effort was made to define the relationship of the two Courts. By the Act of 1681, c. 82, the declaration that the Court of Admiralty was a "souveraigne judicature" was repeated, and it was further declared that the Admiral had a privative jurisdiction in the first instance "in all maritime and seafaring causes forreigne and domestick whether civil or criminal whatsoever within this realme and

[1] Cf. *Flemings* v. *Lord Bothwell*, 1543, M. 7322; Acts of the Parliaments of Scotland, vol. ii. pp. 449, 450.

[2] Stair, Inst. ii. 1, 5.

[3] Act 1532, c. 2.

[4] Mackenzie's Observations on the Acts of Parliament, p. 334.

over all persons as they are concerned in the same." Advocation in maritime causes was prohibited, but a right of appeal to the Court of Session was allowed by bills of suspension which were to be heard summarily and to receive special priority over other causes. The material distinction between procedure by suspension and the former procedure by advocation appears to have been that in suspension the appeal lay rather to the equitable jurisdiction of the Crown inherent in the Lord Chancellor, who at that date sat on occasion in the Court of Session, than to the common law jurisdiction of the Court.[1]

378. Although the prohibition of the advocation of maritime causes was the "great design" of the Act of 1681, it has been pointed out by Sir George Mackenzie, who as Lord Advocate at that date was responsible for the Act, that this object entirely failed, since the Act omitted to define the nature of a maritime cause, and advocation of such causes continued on the ground that they were non-maritime.[2] This Act continued to regulate the relations of the two Courts until the abolition of the Court of Admiralty by the Court of Session Act, 1830.[3]

Subsection (3).—*Criminal Jurisdiction.*

379. In criminal causes the same conflict of jurisdiction arose as in the case of civil causes. From earliest times the jurisdiction of the Court of Justiciary had been regarded as cumulative with that of the Court of Admiralty. By the Act of 1681, however, the privative jurisdiction of the Admiralty Court in criminal maritime causes in the first instance was expressly affirmed, but, as in the case of civil causes, no attempt was made to define their nature. Hume is of the opinion that the true test of a criminal maritime cause is not the *locus* of the offence, but the nature of the offence itself as one against the laws of navigation or of seafaring.[4] In 1828 [5] the jurisdiction of the Court of Justiciary was declared to be cumulative with that of the Court of Admiralty in all crimes and offences whatsoever which might competently be tried in the Court of Admiralty.

380. The Court of Session Act, 1830,[6] made no provision for the exercise of the Admiralty jurisdiction by the Court of Justiciary; but it expressly continued the Admiralty criminal jurisdiction in the Sheriff Court by providing that the Sheriff Courts should hold and exercise an original criminal jurisdiction of the same nature as that formerly exercised by the Court of Admiralty.[6] Occasions, however, for exercising an Admiralty jurisdiction in crime are infrequent, and the Admiralty jurisdiction is in practice treated as merged in the common law criminal jurisdiction of the Sheriff Courts.

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[1] Ross's Lectures on the Law of Scotland, vol. i. p. 360.
[2] Mackenzie's Observations on the Acts of Parliament, p. 462.
[3] 1 Will. IV. c. 69, ss. 21–9.
[4] Hume on Crimes, vol. ii. p. 35.
[5] 9 Geo. IV. c. 29, s. 16.
[6] 1 Will. IV. c. 69, s. 22.

Subsection (4).—*Prize Jurisdiction.*

381. The prize jurisdiction of the Scottish Court differed from that of the English Court in respect that it was inherent in the Admiral and did not require, as it did in England, the issue of a special warrant by the Crown to enable it to be exercised.[1] By the Court of Session Act, 1825,[2] it was transferred to the English Court of Admiralty, and is now exercised by the Admiralty Division of the English High Court of Justice.[3]

Section 2.—Inferior Admiralty Courts.

382. The Judge Admiral had the power of granting commissions as Admirals-depute to local judges in the seaport towns. In later times such commissions were frequently granted to the Sheriffs-Substitute of the counties in which the ports were situated, and provided a means by which summary orders in matters within the Admiralty jurisdiction might be obtained without the delay of applying to the Admiralty Court. The granting of such commissions ceased on the abolition of the Admiralty Court.

383. It was also the practice of the Crown to grant inferior rights of an Admiralty nature both to individuals and to corporations to which judicial functions were attached which were independent of the jurisdiction of the Court of Admiralty. Historically the most important of these were the jurisdictions of the burghs of Edinburgh and of Glasgow in the Firths of Forth and Clyde respectively, exercised through their officers known as water bailies. Such jurisdictions were not struck at by the Act of 1681.[4] Appeal lay to the Court of Admiralty. The Court of Session Act, 1830, provided that such inferior Admiralty jurisdictions should continue, subject to review in the Courts of Session and Justiciary.[5] With the exception of that of the burgh of Glasgow in the Firth of Clyde, which is now confined to minor offences and is exercised in the Court of the River Bailie, these jurisdictions are entirely in abeyance.

Section 3.—Admiralty Jurisdiction as now exercised.

Subsection (1).—*Scope of Jurisdiction.*

384. With the exception of the criminal jurisdiction of the Sheriff Courts which is in practice now treated as merged in their common law jurisdiction, and of the criminal jurisdiction of the river bailie of the Clyde, the Admiralty jurisdiction as now exercised is entirely civil. The Court of Session Act, 1830, which abolished the Court of Admiralty, conferred an original civil jurisdiction on the Court of Session and the

[1] Bell, Com. i. 497.
[2] 6 Geo. IV. c. 120, s. 57.
[3] Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 16.
[4] *Mags. of Edinburgh* v. *Officers of State*, 1831, 10 S. 25.
[5] 1 Will. IV. c. 69, s. 29.

Sheriff Courts of the same nature as that formerly exercised by the Court of Admiralty,[1] but made no provision for the separate administration of the two jurisdictions as was done in England. For this reason the Admiralty jurisdiction is now exercised in Scotland cumulatively and concurrently with the common law jurisdiction, by the same judges, and in the same courts. The two jurisdictions nevertheless remain distinct both in their nature and in the law which requires to be applied under them.

385. The Admiralty jurisdiction falls to be exercised in the following cases :—

(*a*) Where a maritime cause requires to be determined ;

(*b*) Where proceedings of any kind are taken against a ship or goods aboard a ship, whether the cause be maritime or non-maritime ; and

(*c*) Where jurisdiction is expressly assigned to a Court of Admiralty jurisdiction.

SUBSECTION (2).—*Maritime Causes.*

386. In maritime causes the Court of Session and the Sheriff Courts not only exercise their Admiralty jurisdiction, but are bound to administer the maritime law according to the same rules and principles as formerly guided the Court of Admiralty and the Court of Session itself as a court of review of the decisions of the Court of Admiralty.[2] Unfortunately the Act of 1681 entirely failed to define the nature of a maritime cause, and the only definitions which are authoritative are those of the institutional writers which are in very general terms.

387. Bell states that they are those " relative to charter-parties, freights, salvages, wrecks, collision of ships, bottomry, and policies of sea insurance without any regard to the place of contract as executed on sea or land." [3] Erskine states that they are those involving " questions of charter-parties, freights, salvages, wrecks, bottomries, policies of insurance, and in general all contracts concerning the lading or unlading of ships, or any other matter to be performed within the verge of the Admiral's jurisdiction ; and all actions for the delivery of goods sent on shipboard or for recovering their value, or when the subject of the suit consists of goods transported by sea from one port to another." [4]

388. These definitions may be said to cover the following claims : Claims concerning the possession or co-ownership of ships, bottomry and respondentia, damage by collision, affreightment, salvage, towage, necessaries, and wages and master's disbursements. Since the abolition of the Admiralty Court statutory provision has been made for the enforcement of mortgages of ships or shares therein, for the forfeiture of ships, for the removal of shipmasters, and for the enforcement of penalties for hoisting illegal colours or failing to hoist proper national colours, and these proceedings have in England been expressly

[1] 1 Will. IV. c. 69, ss. 21–2.
[2] *Boettcher* v. *Carron Co.*, 1861, 23 D. 322, Lord Justice-Clerk at 330.
[3] Com. i. 546.
[4] Inst. i. 3, 33.

assigned to the Admiralty jurisdiction. For this reason they may reasonably be regarded as maritime causes also in Scotland, and as such subject to the Admiralty jurisdiction. Proceedings for the limitation of liability of shipowners are also statutory and subsequent in date to the abolition of the Admiralty Court, and since in Scotland they are heard on petitions which are subsidiary to maritime causes, they may also be properly regarded as maritime causes.

389. Claims arising from the contract of marine insurance are in a special position, since although they fall within the definitions of the institutional writers they are not now generally regarded as maritime, and in England are determined in the common law courts according to common law principles. Since the majority of decisions on this branch of law are English, such claims may be regarded as no longer proper maritime causes.

Subsection (3).—*Proceedings against Ship or Cargo.*

390. The Admiralty jurisdiction is also exercised in all cases where proceedings are taken against a ship or against cargo aboard a ship, whether the cause be properly maritime or not. The Admiral's jurisdiction was essentially a jurisdiction over ships, the exercise of which was necessary for the proper discharge of his duties of defending the realm, preserving the King's peace at sea, and collecting the customs and other maritime revenues. Proceedings against a ship, therefore, by withdrawing the vessel from her employment, might closely concern the privileges of the Admiral, and for this reason the concurrence of the Judge Admiral was necessary in all such proceedings issuing from the common law courts, and in such circumstances it was the concurrence of the Judge Admiral and not the process of the court which formed the warrant for the arrestment of a ship.[1] The Court now, of course, proceeds entirely in virtue of its own jurisdiction, but proceedings against ships or goods aboard them are still of a special character peculiar to the Admiralty jurisdiction of the Court.

Subsection (4).—*Causes expressly assigned.*

391. In certain cases jurisdiction has been expressly assigned to Courts of Admiralty jurisdiction. Thus claims for work done in the stowing and discharge of cargo or the trimming of coal in ships, none of whose owners reside in the United Kingdom, may be enforced in all courts having jurisdiction in Admiralty as if the claims were claims for necessaries supplied to a ship.[2] Similarly, proceedings for the condemnation or forfeiture of ships under the Foreign Enlistments Act, 1870,[3] are in Scotland expressly assigned to the Admiralty jurisdiction

[1] *Mackenzie* v. *Campbell*, 1829, 7 S. 899; Bankt. Inst. iv. 12, 9.
[2] Merchant Shipping (Stevedores and Trimmers) Act, 1911, 1 & 2 Geo. V. c. 41.
[3] 33 & 34 Vict. c. 90, ss. 19, 30.

of the Court of Session. By the Merchant Shipping Act, 1894,[1] rights of set-off or counter-claim may be determined in proceedings in a Court of Admiralty jurisdiction which concern the claim of a shipmaster in respect of wages or disbursements.

Subsection (5).—*Aircraft.*

392. Courts of Admiralty jurisdiction have a statutory jurisdiction under the Air Navigation Act, 1920,[2] which provides that by Order in Council provision may be made for conferring jurisdiction, in claims arising under the Act or in any other claim in respect of aircraft, on any Court exercising Admiralty jurisdiction.[3] By Order in Council such a jurisdiction has now been conferred on every Court having Admiralty jurisdiction, in respect of claims arising from wreck or from salvage of life or property, or from the duty of rendering assistance to vessels in distress, and may be exercised in the case of aircraft on or over the sea or tidal waters, in the same manner as in the case of vessels.[4]

Section 4.—Admiralty Procedure.

Subsection (1).—*General Characteristics.*

393. The general features which distinguish Admiralty procedure are that it is summary and expeditious, and that it provides special facilities for proceeding *in rem* against a ship or her cargo.[5] The former characteristic is necessary to avoid the detention of ships or seamen for prolonged periods in harbours pending litigation, and to enable summary diligence to proceed against ships which are in danger of being removed from the jurisdiction. The latter is due to the variety of interests which may be concerned in proceedings against a ship. Both are apparent in procedure in Scotland.

394. Under the Act, 1609, c. 22, execution might proceed on the decreets of the Admiral "within three tides," the reason for the rule being, as stated, that "strangers and seafaring men cannot attend as others may."[6] The Act, 1681, c. 82, was expressly declared to be for "the more ready and quick dispatch of justice in maritime and seafaring causes," and provided that suspensions of the decreets of the Court of Admiralty in the Court of Session should be "summarily discussed upon a bill and be privileged and exeemed from the ordinary course of the roll." At a later date the Act 1 & 2 Geo. IV. c. 39 provided that suspensions and reductions of decreets of the Judge Admiral in the

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[1] 57 & 58 Vict. c. 60, s. 167 (3).

[2] 10 & 11 Geo. V. c. 80.

[3] Sec. 14 (2).

[4] Order in Council, 10th August 1921.

[5] Cf. *Owners of s.s.* "*Devonshire*" v. *Owners of Barge* "*Leslie*," [1912] A.C. 634, Lord Haldane at 643; *Ship* "*Marlborough Hill*" v. *Alex. Cowan & Sons, Ltd.*, [1921] 1 A.C. 444, Lord Phillimore at 457; "*The Peerless*," 1860, Lush. 30, Dr Lushington at 41; *Gray* v. *Sutherland*, 1847, 10 D. 154, Lord Jeffrey at 156.

[6] Mackenzie's Observations on the Acts of Parliament, p. 334.

Court of Session should be discussed " in the most expeditious manner in the course of the summar roll," [1] and that the *inducice* of summonses of reduction of maritime causes should be restricted to six days.[2]

395. Since the abolition of the Court of Admiralty maritime causes are no longer entitled as of right to special priority, but will generally be expedited on cause shewn more particularly in questions arising from arrestment. The Court of Session Act, 1830,[3] provided that " applications of a summary nature " in connection with maritime causes might be made to the Lord Ordinary on the Bills. The nature of a summary application has never been defined, but in practice such applications are generally made in relation to the arrestment or dismantling of ships or to their release from arrestment.

396. The form of action *in rem* used in the Admiralty Court is now obsolete, and there is now in Scotland no form of action in general use which corresponds to the action *in rem* as used in England. Scottish maritime causes are therefore subject to the limitation of six months imposed on personal actions by the Public Authorities Protection Act, 1893.[4] For this reason a form of action has recently been devised which has been held to be a true action *in rem* and as such to avoid this limitation.[5] An action in this form is, however, exceptional and outwith the ordinary practice of the courts.

Subsection (2).—*Arrestment of Ship.*

397. As distinguished from the arrestment of other goods, the arrestment of a ship is special in the following respects :—

(1) There is no arrestee, the ship being merely arrested by description for a debt of the owners.[6]

(2) The arrestment immobilises the ship in the place where she is situated at the moment of the arrestment and withdraws her from employment.[7]

(3) The arrestment affects the interests not only of the defender in the action but also of all persons interested in the ship, and is followed out, not as in the case of other arrestments by an action of forthcoming, but by a process of sale, in which all persons pretending to have interest in the ship are entitled to lodge claims.

398. Notwithstanding these specialties the warrant of arrestment contained in the summons of a petitory action in ordinary form is as effectual to arrest the ships as the other goods of the defender,[8] and the opinion has been expressed that it also conveys authority to dismantle

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[1] Sec. 3. [2] Sec. 4. [3] 1 Will. IV. c. 69, s. 21.
[4] 56 & 57 Vict. c. 61 ; " *The Burns*," [1907] P. (C.A.) 137.
[5] *Ellerman's Wilson Line, Ltd.* v. *Northern Lighthouse Commissioners*, 1921 S.C. 10.
[6] *Barclay, Curle & Co., Ltd.* v. *Sir James Laing & Sons, Ltd.*, 1908 S.C. 82, Lord M'Laren at 89.
[7] *Wolthekker* v. *Northern Agricultural Society*, 1862, 1 M. 211, Lord Benholme at 213.
[8] *Clark* v. *Loos*, 1853, 15 D. 750.

the ship if necessary.[1] In practice, however, ships are invariably mentioned specifically in the warrant,[2] and where it is desired to dismantle them, special application is made in the Court of Session to the Lord Ordinary on the Bills,[3] and in the Sheriff Court to the Sheriff. Arrestment of a ship on the dependence of a personal action should be used with caution. Although it has the effect of detaining the ship until it is withdrawn, it merely attaches the interest of the defender in the vessel, such as it is, and if the defender is not in fact the true owner of the ship or has merely a reversionary interest in her it is ineffectual for the purposes of the action as having attached nothing.[4]

399. Where a ship has been arrested in this manner and the precise nature and extent of the defender's interest in her is uncertain, a third party who desires her continued employment may secure her release by obtaining letters of loosing of the arrestment in the Bill Chamber under an obligation to make her forthcoming at a later date. Unlike the recall of an arrestment, which extinguishes the diligence, the effect of a loosing is merely to suspend its operation for the period for which it is in force.[5] The vessel may thus be released to fulfil her engagements, while at the same time the diligence remains unimpaired *quoad* the defender's interest and may be enforced against the ship at any time after her return.[6]

400. Where it is desired to assert a maritime lien or other real right in a ship it is necessary to arrest her *in rem*, in which case the interests of all persons interested in her are attached.[7] A warrant of arrestment *in rem* may be obtained from the Lord Ordinary on the Bills or from the Sheriff, and may be executed on exhibition of a certified copy of the interlocutor allowing it.[8] Although it has never been expressly so held, similar procedure appears to be competent to enforce real rights in cargo. Following the arrestment *in rem*, the real right is enforced by a petitory action containing conclusions declaratory of the real right.

Subsection (3).—*Process of Sale.*

401. Where necessary for the enforcement of a personal or real right the ship or cargo may be brought to a judicial sale in a process of sale. The process of sale usually proceeds on a debt which has already been constituted, but prior constitution is not essential, and conclusions for constitution of the debt may be combined with conclusions for

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[1] *English's Coasting and Shipping Co., Ltd.* v. *British Finance Co., Ltd.*, 1886, 14 R. 220, Lord Ordinary at 223.

[2] Jur. Styles, iii. 301.

[3] C.A.S., E. iii. 3.

[4] Cf. *Clydesdale Bank, Ltd.* v. *Walker & Bain*, 1925 S.L.T. 676.

[5] Bell, Com. ii. 70.

[6] Cf. *Anderson, Child & Co.* v. *Pott & M'Millan*, 1825, 3 S. 498; *Middlemass* v. *Brown*, 1828, 6 S. 511; *Malcolm* v. *Cook*, 1853, 16 D. 262.

[7] *Clan Line Steamers, Ltd.* v. *Earl of Douglas S.S. Co., Ltd.*, 1913 S.C. 967.

[8] *M'Connachie, Petr.*, 1914 S.C. 853.

sale.[1] The summons so far as special to the process of sale concludes for declarator that the vessel should be judicially sold ; for payment to the pursuer of the free proceeds of the sale after the necessary expenses have been met ; for deposit of the balance, if any, in Court ; and for adjudication of the vessel to the purchaser free of all incumbrances.[2]

402. In the event of no defences being lodged further procedure is by minute ; (*a*) a minute is lodged craving warrant for a remit to a person of skill to make an inventory of the ship, and to value her preparatory to the sale ; (*b*) on return of the inventory a second minute is lodged, craving warrant for the public sale of the vessel at the upset price named in the inventory after due advertisement in the newspapers, and for the lodging of the proceeds in Court ; (*c*) on conclusion of the sale a third minute is lodged craving approval of the sale ; a finding that the ship is the property of the purchaser ; that the pursuer is entitled to the expenses of bringing her to sale preferably out of the proceeds ; and that he is entitled *primo loco* out of the balance to the sum sued for, or, should the balance be less than the sum sued for, to the whole fund in extinction *pro tanto* of his debt. The Court will then order competing claims on the fund, if any, to be lodged, and will thereafter pronounce an interlocutor of ranking and preference as in a multiplepoinding.

403. The order of ranking of claims may be varied to some extent in particular cases on equitable grounds, but the general order is the following : (*a*) shipwright's lien ; (*b*) maritime liens ; (*c*) mortgages ; (*d*) personal claims in the order in which diligence is used. The sale of the ship confers a title *in rem* on the purchaser which is valid against the whole world, and will be recognised by foreign tribunals.

Subsection (4).—*Action of Set and Sale.*

404. Where co-owners are in such pronounced disagreement as to render the continued employment of the vessel in their common interest impracticable a part-owner may raise an action in special form, known as an action of set and sale, by which his co-owners may be compelled to buy the vessel at a price named by him or otherwise to sell her to him at the same price. The origin of this form of action is unknown,[3] but the jurisdiction of the Court is clearly equitable in character, and the action appears to be intended to protect the interests of the owners of minority shares where the vessel is committed by the majority to an enterprise of which the minority disapprove.

405. In form the action is one of declarator. The summons should narrate that the pursuer has made overtures for a settlement of the dispute by mutual consent, and that on their failure he has made a

[1] *Taylor* v. *Williamson*, 1831, 9 S. 265. [2] Jur. Styles, iii. 181.
[3] *Cf.* Bell, Com. i. 503, 506.

formal offer to sell his shares to the defender at a certain price, or otherwise to buy those of the defender at the same price. The summons then concludes for declarator that the defender should buy the pursuer's shares at the price which he has placed upon them ; or otherwise that the defender should sell his own shares to him at the same price ; or otherwise that the ship should be publicly sold as in a process of sale.[1] The offer of the pursuer in order to be valid requires to be one to sell all his own shares, or otherwise to buy all those of the defender,[2] and it will not be met in cases where there are two or more defenders, by an acceptance on the part of some only of them.[3]

406. When the ship requires to be brought to a judicial sale the Court will remit to a person of skill to value her as in the ordinary process of sale, and where this valuation differs from the price named by the pursuer in the summons, it is a question of circumstances which should be taken as the upset price.[4] The upset price may be fixed at a figure slightly below the true value of the ship in order to stimulate competition. It is not incompetent for the pursuer himself to compete at the sale, but since he is in a fiduciary position towards his co-owners he should obtain the consent of the Court before doing so. It is obviously in his interest as a purchaser that the upset price should be fixed at as low, and as a seller at as high, a figure as possible.[5]

Subsection (5).—*Statutory Procedure.*

407. Apart from these specialties and from certain statutory provisions regarding special forms of action contained in the Merchant Shipping Act, 1894,[6] the Maritime Conventions Act, 1911,[7] and other statutes, Admiralty procedure in Scotland is now substantially the same as common law procedure. It may be noted, however, that the signeting of summonses which in common law actions is peremptory in the Court of Session, is in maritime causes merely permissive. The Court of Session Act, 1830,[8] provided that summonses in maritime causes should be signed by one of the principal or depute clerks of Session and that signeting was unnecessary. By the Court of Session Act, 1838,[9] it was provided that summonses in Admiralty causes might pass the Signet in the same manner as other summonses in the Court of Session. As the latter provision is merely permissive, it appears that signature by a Clerk of Session may take the place of signeting. In practice, however, the summons in a maritime cause now invariably passes the signet in the same manner as other summonses.

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[1] Jur. Styles, iii. 180.
[2] *Hutton* v. *Hay*, 1880, 2 Guthrie's Sheriff Court Reports, 537.
[3] *Anderson* v. *Sillars*, 1894, 22 R. 105.
[4] *Morice* v. *Craig*, 1901, 39 S.L.R. 609.
[5] *Morice* v. *Craig*, supra ; *Elias* v. *Black*, 1856, 18 D. 1225.
[6] 57 & 58 Vict. c. 60.
[7] 1 & 2 Geo. V. c. 57.
[8] 1 Will. IV. c. 69, s. 40.
[9] 1 & 2 Vict. c. 118, s. 29.

SUBSECTION (6).—*Procedure in Air Navigation Claims.*

408. The general intention of the legislature is that procedure in claims arising from air navigation shall be assimilated, so far as appropriate, to procedure in Admiralty. In respect of the jurisdiction conferred on Courts of Admiralty jurisdiction under the Air Navigation Act, 1920,[1] that Act provides (*a*) that His Majesty may by Order in Council apply to proceedings taken to enforce any claim under it or any other claim in respect of aircraft, any rules of practice or procedure applicable to proceedings in Admiralty;[2] and (*b*) that sec. 692 of the Merchant Shipping Act, 1894,[3] shall apply with the necessary modifications to the detention of any aircraft under the Act, or under any order or regulation made under the Act, as it applies to the detention of a ship.[4] Under this provision it has been provided by Order in Council[5] that the jurisdiction conferred on Courts of Admiralty jurisdiction may be exercised by proceedings either *in rem* or *in personam*,[6] and generally that the powers of Courts of Admiralty jurisdiction and the rules of practice and procedure for the time being in force in them, with reference to their Admiralty jurisdiction, shall apply and be extended, with such modifications as may be necessary, to the claims in respect of aircraft which have been expressly assigned to their Admiralty jurisdiction.[7] In Scotland no modification of Admiralty procedure in the case of aircraft has as yet been adopted, and the only rule of procedure expressly made applicable to aircraft is that contained in the Act of Sederunt, 29th January 1926, with reference to claims for Workmen's Compensation. In that Act of Sederunt provision is made for the Court in which the application for compensation shall be made in the case of an accident arising out of employment in an aircraft and occurring outside Scotland.[8]

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[1] 10 & 11 Geo. V. c. 80.
[2] Sec. 14 (2).
[3] 57 & 58 Vict. c. 60.
[4] Sec. 14 (3).
[5] Order in Council, 10th August 1921.
[6] Sec. 3.
[7] Sec. 4; see *supra*, para. 391.
[8] Sec. 4 (4).

ADMISSIONS AND CONFESSIONS.

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Section 1.—Introductory.

409. The legal significance attached to admissions made by persons against their interest in the subject-matter of a litigation varies according as they do or do not form part of the record in the litigation in question. Where they form part of the record, admissions are in general held, as against the party by or for whom they are made, to be true for the purposes of that particular litigation. They are known as judicial admissions and, being already on record, they do not require to be proved by evidence. In all cases it is a question of construction whether any statement on record amounts to an admission against the interest of the party making it. In consistorial causes there is by virtue of statute [1] an exception to the rule that a fact judicially admitted does not require to be proved against the party making the admission. In criminal prosecutions a judicial admission of fact, unless tendered and accepted as a plea of guilt, cannot be received, but this rule has been relaxed by statute [2] in the case of summary prosecutions.

410. Admissions against interest made by parties otherwise than on record are known as extra-judicial admissions, and in general they require to be proved to have been made or uttered by the party. When established they are not conclusive of the truth of the fact admitted, but are only elements of evidence, and they may be explained by other evidence. While an extra-judicial admission is always a relevant item of evidence, its admissibility may be qualified where it has been obtained by duress or otherwise appears not to be truly the admission

[1] Court of Session Act, 1830 (11 Geo. IV. & 1 Will. IV. c. 69), s. 36.
[2] Summary Jurisdiction (Scotland) Act, 1908 (8 Edw. VII. c. 65), s. 39.

of the party. This qualification of the admissibility of extra-judicial admissions for the most part arises in criminal prosecutions where admissions are usually described as confessions.

411. Historically, the rules relating to the admissibility and effect of admissions and confessions by a party against interest were developed out of an obvious distinction which required to be drawn between the party's statement admitting a fact and the fact so admitted ; an obvious distinction, because, until the Evidence Acts of 1852 and 1853,[1] a party to a cause was not a competent witness, and his admissions could not ordinarily be received directly, but only through the medium of the written pleadings or the evidence of a third party witness. Since the passing of the statutes referred to, the evidence of a party witness setting up facts against his interest has never been classified either as judicial or extra-judicial admission.[2] It is treated simply as evidence in the cause, and is admissible to the same effect as the evidence of a third party witness, with the qualification that while in exceptional circumstances a party may discredit a third party witness adduced by himself, he could not be heard to discredit himself.

Section 2.—Judicial Admissions.

Subsection (1).—*How made.*

412. Judicial admissions may be contained in the closed record in an action,[3] or in a minute of admissions lodged in the process,[4] or in a joint case prepared for the opinion of foreign counsel upon a question raised in the action.[5] In the statutory process of a special case [6] the agreed-on statement of facts is binding on all the parties to it as joint judicial admissions. The general rule is that judicial admissions of fact are, in themselves and without anything more, conclusive against the party making them for all the purposes of the process in which they are made.[7]

413. In jury trials there has grown up a practice of specially tendering in evidence admissions made by an opponent in the closed record. This practice seems to be based on the theory that while the record is before the judge, it is not before the jury unless put in evidence. Since the Jury Court was merged [8] in the Court of Session, it is thought that

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[1] 15 Vict. c. 27, s. 2 ; and 16 Vict. c. 20, s. 3.

[2] See *Reid* v. *Reid*, 1925 S.N. 147, as illustrating circumstances in which the distinction between a party's evidence setting up a fact against interest and evidence of his extra-judicial admission of the fact may be material.

[3] Court of Session Act, 1825 (6 Geo. IV. c. 120), ss. 10 and 13 ; *Bathgate* v. *Macadam*, 1840, 2 D. 811.

[4] C.A.S., F, 1, 12 ; *Nisbet* v. *Cairns*, 1864, 2 M. 863 ; *Carswell & Son* v. *Finlay*, 1887, 24 S.L.R. 643 ; *London and Edinburgh Steam Shipping Co.* v. *Admiralty*, 1920 S.C. 309.

[5] *Weston* v. *Broughton*, 1830, 8 S. 424.

[6] Court of Session Act, 1868 (31 & 32 Vict. c. 100), s. 63.

[7] *Scottish Marine Insurance Co.* v. *Turner*, 1853, 1 Macq. 334, per Ld. Truro at p. 340.

[8] Court of Session Act, 1830 (11 Geo. IV. & 1 Will. IV. c. 69), s. 1.

the practice is superfluous and that the jury has cognisance of admissions in the closed record though not put in evidence,[1] and that it is the duty of the judge to inform the jury of such admissions.[2] Admissions made by minute, if it is desired to use them at the trial, are read to the jury as directed by Act of Sederunt.[3]

414. In consistorial causes parties are bound by their admissions, which, in this sense, are conclusive ; but the Court cannot pronounce decree in favour of the pursuer in the absence of sufficient evidence of the relevant averments.[4]

415. In summary prosecutions admissions of particular facts may be made by minute, and they are not binding on the accused unless he has legal assistance.[5] In solemn procedure admissions would appear to be wholly incompetent since, when the libel has been remitted to an assize, nothing can be done of consent of the accused.[6] A verbal admission of guilt made when called on to plead to the libel is conclusive against the accused,[7] but where made under error the accused has been allowed to withdraw a plea of guilty before sentence.[8]

416. In civil causes a statement made by counsel at the bar may be binding on his client,[9] and where an interlocutor of the Sheriff bore to proceed on a statement made by the party's agent at the bar, the Court, on a denial that the statement was made, proposed *ante omnia* to remit to the Sheriff for a report.[10]

Subsection (2).—*Construction.*

417. Admissions, when made, are subject to construction by the Court, and the tendency is to construe them strictly and against the party founding on them.[11] Admissions made by minute are not held

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[1] *Shuarmans & Son* v. *Stephen & Sons*, 1832, 10 S. 839 ; and *Pearson* v. *Walker*, 1835, 13 S. 1138.

[2] *Scottish Marine Insurance Co.* v. *Turner*, 1853, 1 Macq. 334.

[3] C.A.S., F, 1, 12.

[4] Court of Session Act, 1830 (11 Geo. IV. & 1 Will. IV. c. 69), s. 36 ; *Muirhead* v. *Muirhead*, 1846, 8 D. 786 ; and *Macfarlane* v. *Macfarlane*, 1847, 9 D. 500.

[5] Summary Jurisdiction (Scotland) Act, 1908 (8 Edw. VII. c. 65), s. 39. It has been decided that the admission contained in a modified plea tendered and rejected cannot be looked to (*Cochran* v. *Ferguson*, 1882, 10 R. (J.) 18) ; similarly, neither could a verbal admission by accused's agent (*Tullis* v. *Millar*, 1899, 1 F. (J.) 75) ; the same law was accepted in *Brown* v. *Macpherson*, 1918 J.C. 3, although it cannot be said that the terms of s. 39 of the recent statute were fully discussed, and *prima facie* they appear to prescribe a minute as a permissive mode of making admissions rendered competent in wider terms.

[6] *Wynn* v. *Lindsay*, 1883, 11 R. (J.) 18 ; and *H.M. Adv.* v. *Laird & Hosie*, 1922 J.C. 17.

[7] *Mackay* v. *Patrick*, 1882, 10 R. (J.) 10.

[8] Criminal Procedure (Scotland) Act, 1887 (50 & 51 Vict. c. 35), s. 41 ; *H.M. Adv.* v. *Lyon*, 1887, 15 R. (J.) 66 ; *H.M. Adv.* v. *Black*, 1894, 1 Adam 312 ; *H.M. Adv.* v. *Robertson*, 1899, 1 F. (J.) 74 ; *Solicitor-General* v. *A.B.*, 1914 S.C. (J.) 38 ; *Paul* v. *H.M. Adv.*, 1914 S.C. (J.) 69 ; and *H.M. Adv.* v. *Aikman & Martin*, 1917 J.C. 8.

[9] *Lauder* v. *National Bank of Scotland*, 1918, 1 S.L.T. 43.

[10] *Whyte* v. *Whyte*, 1895, 23 R. 320.

[11] *Darnley* v. *Kirkwood*, 1845, 7 D. 595 ; *Chrystal* v. *Chrystal*, 1900, 2 F. 373 ; *Baikie* v. *Glasgow Corporation*, 1918 S.C. 67 ; 1919 S.C. (H.L.) 13 ; and *Percy* v. *Glasgow Corporation*, 1922 S.C. (H.L.) 144.

to be in substitution for, but are in addition to, and are construed along with, the averments and admissions in the closed record.[1] Admissions are to be construed with reference to the circumstances of the case in which they are made. An admission of having entered into a contract relating to heritage will not be construed as an admission that the contract was reduced to holograph or probative writing or that *locus pœnitentiæ* was otherwise excluded.[2] Where citation was necessary to interrupt prescription, an admission of receipt of the summons was not held to be an admission of citation.[3]

418. Parties sometimes admit the authorship, tenor, and communication of documents by a reference to copies produced. They may also be held to have admitted authorship, tenor, and communication by averments relating to the signing, substance, and effect of a document, though no copy is produced.[4] A reference to a document for its terms, however, is not construed as an admission that the document exists.[5] A party is entitled to state all his grounds of action or of defence on record at the same time. Where these are based on different and inconsistent views of the facts they should be stated alternatively, and if this is done an averment in support of the one alternative view of the facts will not be construed into an admission on the other alternative. A denial by a common carrier of the receipt of goods was not construed as an admission that he did not deliver these goods,[6] and a plea of compensation was not construed as an admission of liability for an account which had prescribed.[7]

Subsection (3).—*Qualified Admissions.*

419. Admissions must be taken with all their qualifications and explanations appearing on record,[8] and the question of whether any particular qualification is intrinsic or extrinsic of the admission does not arise in this connection.[9] Where liability is admitted under reference to one account, both sides of the account must be taken together.[10] But an admission of liability for deposits received as shewn by a bank's deposit journal was not held to be qualified by the payments recorded in the bank's ledger account,[11] nor was admission of liability for a sum

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[1] *Nisbet* v. *Cairns*, 1864, 2 M. 863 ; and *London and Edinburgh Steam Shipping Co.* v. *Admiralty*, 1920 S.C. 309.

[2] *Jamieson* v. *Edinburgh Mutual Investment Building Society*, 1913, 2 S.L.T. 52.

[3] *Campbells* v. *Macneil*, 1799, Mor. 11120.

[4] *Dowgray* v. *Gilmour*, 1907 S.C. 715. In this case, however, the admission of signing the document was qualified by an averment that its contents were not known.

[5] *Pringle* v. *Bremner & Stirling*, 1867, 5 M. (H.L.) 55.

[6] *Cruickshank, Fraser & Co.* v. *Caledonian Railway Co.*, 1876, 3 R. 484.

[7] *Alcock* v. *Easson*, 1842, 5 D. 356; and *Campbell* v. *Grierson*, 1848, 10 D. 361.

[8] *Kerr's Trs.* v. *Ker*, 1883, 11 R. 108 ; and *Dowgray* v. *Gilmour*, 1907 S.C. 715.

[9] *Campbell* v. *M'Cartney*, 1843, 14 D. 1086.

[10] *Campbell* v. *M'Cartney*, 1843, 14 D. 1086 ; *Picken* v. *Arundale & Co.*, 1872, 10 M. 987 · *Gelstons* v. *Christie*, 1875, 2 R. 982 ; and *Coghill* v. *Coghill*, 1896, 4 S.L.T. 215.

[11] *British Linen Co. Bank* v. *Thomson*, 1853, 15 D. 314.

sued for held to be qualified by an irrelevant counter-claim.[1] Further, a party may found on the admission, notwithstanding that it was made subject to a qualification when the qualification has been disproved.[2]

Subsection (4).—*Implied Admissions.*

420. In adjusting the record, parties are obliged to answer all the averments of fact made by their opponents.[3] Failure to answer completely may be construed as an admission. Where a party is silent with regard to facts averred by his opponent and within his own knowledge, his silence must be construed as an admission of the truth of such facts.[4] In order to bring this rule into operation the party must have had an opportunity to answer his opponent's averment.[5] Where it is necessary to a party's case on record to establish that something was not done, a mere general denial in the face of the other party's specific averment that the thing was done may be treated as an admission that the thing in question was done.[6]

Section 3.—Extra-judicial Admissions.

421. Statements made by a party against his interest in the subject-matter of a litigation may be proved against him. Such statements are relevant not merely to the party's credibility as a witness (if he has been adduced as such and has denied making them), but also to the demerits of his case.[7]

Subsection (1).—*Admissions by Co-litigants.*

422. Where there is a plurality of parties on the same side of a litigation the admission of any one of them may be proved against himself, but in general it is hearsay, and therefore not competent evidence for or against the others.[8] While an admission may be proved against

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[1] *Robertson & Co.* v. *Baird & Co.*, 1897, 24 R. 1076.

[2] *Anderson* v. *Rintoul*, 1825, 3 S. 496; 1827, 5 S. 744.

[3] A.S., 11th July 1828, s. 105, as regards the Court of Session, and Sheriff Courts (Scotland) Act, 1907 (7 Edw. VII. c. 51), First Schedule, rule 44, as regards the Sheriff Court. *Casey* v. *Sinclair*, 1886, 23 S.L.R. 305; and *A.* v. *B.*, 1899, 36 S.L.R. 533.

[4] This rule is contained in the provisions of the section of the Act of Sederunt and the rule of the Sheriff Courts Act, above cited, and is imperative. *Pegler* v. *Northern Agricultural Implement Co.*, 1877, 4 R. 435, per the Lord President at p. 438; *Central Motor Engineering Co.* v. *Galbraith*, 1918 S.C. 755.

[5] *Gunn* v. *Melrose*, 1894, 2 S.L.T. 56.

[6] *Dalziel School Board* v. *Scottish Education Department*, 1915 S.C. 234; and *Ross* v. *Glasgow Corporation*, 1920, 1 S.L.T. 68.

[7] *Promoter Life Assurance Co.* v. *Barrie's Representatives*, 1830, 5 Mur. 136; *Mack* v. *Cleland*, 1832, 10 S. 850; and *Young & Co.* v. *Muir*, 1824, 2 Sh. App. 25.

[8] *Ramsay* v. *Ramsay*, 1880, 17 S.L.R. 793; *Laidlaw* v. *Laidlaw*, 1894, 2 S.L.T. 168; *Rattray* v. *Rattray*, 1897, 25 R. 315; *Ld. Adv.* v. *M'Callum & Corner*, 1853, 1 Irv. 259; *Ld. Adv.* v. *Monson*, 1893, 21 R. (J.) 5; and *Ld. Adv.* v. *Robertson*, 1896, 2 Adam 92.

the accused who made it, a co-accused is not entitled to lead evidence of the admission in order to exculpate himself.[1] Where, however, association, as of conspiracy [2] or joint adventure,[3] has been established among the co-parties, any admission, if inferred from or contained in a statement made by any one of them in furtherance of the conspiracy or joint adventure, is relevant evidence against them all. But a statement made by any one after the joint purposes have determined, while admissible against himself, is not evidence against the other co-parties.

Subsection (2).—*Admissions in Other Causes.*

423. Statements of parties containing admissions may be made in writing or orally. Averments made in a prior litigation, whether between the same parties or not, may be proved as extra-judicial admissions.[4] They may, however, not have been authorised by the party, or may have been the result of compromise, or may for some other reason have been made only for the purpose of the litigation in which they occurred. It seems open to doubt whether the party tendering such pleadings as evidence of admission must prove that they were authorised by the party or whether such authorisation will be presumed in the absence of special circumstances.[5] Where the party himself has signed the pleadings, any admission contained in them may always be proved against him.[6] A plea of guilty to a criminal charge may be proved as an extra-judicial admission.[7] A prisoner's declaration may be proved in a subsequent civil action as an extra-judicial admission, provided, however, it has been put in evidence at the criminal trial.[8] Statements made in evidence given in a prior action may be proved by the shorthand writer who noted it,[9] or where not so recorded, by some person who was present in Court and heard the evidence given.[10] Admissions contained in an oath on reference in a previous cause may also be proved.[11]

Subsection (3).—*Correspondence.*

424. Statements contained in correspondence or even in casual conversation may be admitted in evidence.[12] Statements, though not made by the party personally, may be admitted if proved to have been

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[1] *Ld. Adv.* v. *Lyall and Ramsay*, 1853, 1 Irv. 189.
[2] *Ld. Adv.* v. *Camerons*, 1911 S.C. (J.) 110.
[3] *Knox* v. *Martin*, 1850, 12 D. 719; and *Pickard & Curry* v. *Prescott*, 1892, 19 R. (H.L.) 56, per Halsbury L.C. at p. 62.
[4] *Aitchison* v. *Aitchison*, 1877, 4 R. 899, per Ld. Ormidale at p. 921.
[5] *Morrison* v. *Somerville*, 1860, 23 D. 232.
[6] *Cairns* v. *Marianski*, 1850, 12 D. 1286, at p. 1289; 1851, 1 Macq. 212.
[7] *Lord Yester*, 1541, Mor. 14021.
[8] *Little* v. *Smith*, 1847, 9 D. 737.
[9] *Ld. Adv.* v. *Banaghan*, 1888, 15 R. (J.) 39.
[10] *M'Giveran* v. *Auld*, 1894, 21 R. (J.) 69.
[11] *Hunter* v. *Macalister*, 1836, 15 S. 159.
[12] *Mack* v. *Cleland*, 1832, 10 S. 850.

authorised by him.[1] Ambiguous denials by a party may be proved as supporting the inference of an implied admission. For this purpose it is admissible to prove the statement or writing addressed to the party in order to expiscate the true meaning of his denial. In circumstances where a course of correspondence would ordinarily require a party to correct an alleged misstatement of the facts by his opponent, his silence or failure to do so may be construed as an admission that his opponent's account of the facts was the correct one.[2] But where the correspondence bears to be without prejudice, it cannot be proved as supporting admissions.[3]

Subsection (4).—*Effect of Extra-judicial Admissions.*

425. When established to have been made, extra-judicial admissions are not conclusive of the fact admitted, but are merely elements to be weighed with the other evidence in the case.[4] Where evidence of a statement has been tendered as an admission, evidence of circumstances tending to explain or qualify the statement becomes relevant and may be led by the party against whom the admission is founded on. An extra-judicial admission of liability made under error in law is not binding in a question with a third party.[5]

Section 4.—Confessions.

Subsection (1).—*Must be Voluntary.*

426. In criminal prosecutions extra-judicial admissions are generally described as confessions. In common with all extra-judicial admissions no weight can be given to confessions in evidence, where it has been established that from insanity or forgery they were not truly the act of the party, or that they fall to be set aside as having been obtained by such means as force and fear, or fraud. The peculiarity attaching to confessions in criminal causes, however, is that the burden is on the prosecutor tendering them to make it appear from the evidence that they were made voluntarily. Where they do not appear to have been made voluntarily, evidence of confessions will be excluded. It has been said that such confessions are not excluded on the ground of incompetency of the evidence, but in the exercise of a discretionary power in the Court for the protection of accused persons.[6] If this view is sound it would appear to bring accuseds' confessions within the sphere of protected or privileged statements where the exclusion applies.

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[1] *Anderson* v. *Anderson*, 1848, 11 D. 118.
[2] *Dowling* v. *Henderson & Son*, 1890, 17 R. 921; and *Shankland* v. *Robinson*, 1919 S.C. 715; 1920 S.C. (H.L.) 103.
[3] *Fyfe* v. *Miller*, 1835, 13 S. 809; and *Williamson* v. *Taylor*, 1845, 7 D. 842.
[4] *Ld. Adv.* v. *Banaghan*, 1888, 15 R. (J.) 39.
[5] *Beattie & Muir* v. *Brown*, 1883, 11 R. 250.
[6] *Gracie* v. *Stuart*, 1884, 11 R. (J.) 22, per Ld. Young at p. 26.

SUBSECTION (2).—*Statements to Persons other than Police or Criminal Authorities.*

427. Letters written [1] and statements made [2] by a prisoner in jail may be proved as confessions ; not having been made to a prison official. Similarly, statements made by accused persons under promise of safety or protection may be proved ; [3] not having been made to the public prosecutor or his officials. Where, however, a confession is made to a person in a position of authority over the accused it may be excluded. In the case of confessions made to an employer or superior officer they appear generally to have been admitted if made at a time when no inquiry had been set afoot by the criminal authorities,[4] but to have been excluded if it had.[5]

SUBSECTION (3).—*Statements to Police or Criminal Authorities.*

428. Confessions made to the police at or about the time of arrest, no charge having been made, appear generally to have been admitted, even though no warning was given that they might be used in evidence, and even though in answer to legitimate questions,[6] but to have been excluded if made in the absence of warning and in answer to questions devised to obtain evidence.[7] Where made to the police while under detention between the time of arrest and the time of committal to jail, confessions appear generally to have been admitted if not induced by questions and unfair treatment,[8] but to have been excluded if made in answer to questions unduly pressed.[9]

429. Once the accused has been committed to jail the proper mode of receiving anything he has to say relative to the charge is by declaration before a magistrate. It is the jailer's duty to take the prisoner before a magistrate,[10] and the law is jealous of conversations between

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[1] *Ld. Adv.* v. *Fawcett*, 1869, 1 Coup. 183 ; and *Ld. Adv.* v. *Walsh*, 1922 J.C. 82.

[2] *Ld. Adv.* v. *Johnston*, 1845, 2 Broun 401.

[3] *Ld. Adv.* v. *Cuthbert*, 1842, 1 Broun 311 ; and *Ld. Adv.* v. *Duff*, 1910, 6 Adam 248.

[4] *Ld. Adv.* v. *Simpson*, 1889, 2 White 298 ; and *Waddell* v. *Kinnaird*, 1922 J.C. 40.

[5] *Ld. Adv.* v. *Turner & Rennie*, 1853, 1 Irv. 284 ; and *Ld. Adv.* v. *Robertson*, 1853, 1 Irv. 219.

[6] *Ld. Adv.* v. *Bryce*, 1864, 4 Irv. 506 ; *Ld. Adv.* v. *Paterson*, 1842, 1 Broun 388 ; *Ld. Adv.* v. *Thomson*, 1857, 2 Irv. 747 ; *Ld. Adv.* v. *Hay*, 1858, 3 Irv. 181 ; *Lewis* v. *Blair*, 1858, 3 Irv. 16 ; *Ld. Adv.* v. *Laing*, 1871, 2 Coup. 23 ; *Gracie* v. *Stuart*, 1884, 11 R. (J.) 22 ; *Hodgson* v. *Macpherson*, 1913 S.C. (J.) 68 ; *Brown* v. *Macpherson*, 1918 J.C. 3 ; *Costello* v. *Macpherson*, 1922 J.C. 9.

[7] *Ld. Adv.* v. *Millar*, 1859, 3 Irv. 406 ; *Ld. Adv.* v. *Smith*, 1901, 3 Adam 475.

[8] *Smith* v. *Campbell*, 1855, 2 Irv. 1 ; *M'Rae* v. *Blair*, 1856, 2 Irv. 568 ; *Ld. Adv.* v. *Wyllie*, 1858, 3 Irv. 218 ; *Russell* v. *Paton*, 1902, 4 F. (J.) 77.

[9] *Ld. Adv.* v. *Martin*, 1842, 1 Broun 382 ; *Ld. Adv.* v. *Bryce*, 1864, 4 Irv. 506 ; *Kerr* v. *Mackay*, 1853, 1 Irv. 213 ; *Ld. Adv.* v. *Mahler and Berrenhard*, 1857, 2 Irv. 634 ; *Ld. Adv.* v. *Grant*, 1862, 4 Irv. 183 ; *Ld. Adv.* v. *Graham*, 1876, 3 Coup. 217.

[10] *Ld. Adv.* v. *Hope*, 1845, 2 Broun 465 ; and *Ld. Adv.* v. *Beaton or Bethune*, 1856, 2 Irv. 457.

him and his warders.[1] Confessions made after committal, otherwise than before a magistrate, if reduced to writing by prison officials, are inadmissible as being irregular declarations,[2] and if tendered as confessions made verbally to prison officials, they are inadmissible unless persisted in after clear and unambiguous warning has been given that they may be used in evidence.[3] When the accused has been liberated on bail his confession to the police is admissible.[4]

Subsection (4).—*Declarations by Prisoners.*

430. The formal authenticated declaration made by the accused before a magistrate may be tendered as evidence against the accused, but the accused is not entitled as matter of right to tender it in his own favour.[5] The declaration proves its own contents, unless challenged,[6] and it is the only competent evidence of what was declared before the magistrate. The declaration must relate to a specific charge preferred against the accused.[7] Where made on one charge, it is admissible in a trial on the same *species facti*, provided the trial relates to the same or a lesser charge.[8] But a declaration emitted on a charge of assault is not admissible in a trial for murder on the same *species facti*.[9] Where the prisoner has emitted more than one declaration, all or none must be put in evidence against him.[10]

431. The declaration may be challenged on the ground of an intrinsic irregularity appearing on the face of it, as that it is not authenticated by the prisoner and the magistrate,[11] or that the person bearing to authenticate it is not a magistrate.[12] But it need not be signed on every page,[13] and clerical errors may be corrected.[14] Extrinsic irregularities may be proved by parole, as that the prisoner was not in his sound and sober senses,[15] that he was in ignorance of his right to legal assistance,[16] or that the magistrate was not present throughout the proceedings.[17] The

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[1] *Smith* v. *Lamb*, 1888, 15 R. (J.) 54, per Ld. Young.
[2] *Ld. Adv.* v. *Cuthbert*, 1842, 1 Broun 311; and *Ld. Adv.* v. *Hendry & Craighead*, 1857, 2 Irv. 618.
[3] *Ld. Adv.* v. *Proudfoot*, 1882, 9 R. (J.) 19; and *Ld. Adv.* v. *Ross*, 1859, 3 Irv. 434.
[4] *Smith* v. *Lamb*, 1888, 15 R. (J.) 54.
[5] *Ld. Adv.* v. *Potts*, 1842, 1 Broun 497.
[6] Criminal Procedure (Scotland) Act, 1887 (50 & 51 Vict. c. 35), ss. 19 and 69.
[7] *Ld. Adv.* v. *Dempster*, 1862, 4 Irv. 143.
[8] *Macdougall* v. *Maclullich*, 1887, 14 R. (J.) 17.
[9] *Ld. Adv.* v. *Stewart*, 1866, 5 Irv. 310.
[10] *Ld. Adv.* v. *Loch*, 1837, 1 Swin. 494.
[11] *Ld. Adv.* v. *Plenderleith*, 1841, 2 Swin. 558; and *Ld. Adv.* v. *French*, 1855, 2 Irv. 198.
[12] *Ld. Adv.* v. *Kelly*, 1843, 1 Broun 543; and *Ld. Adv.* v. *Stewart*, 1857, 2 Irv. 614.
[13] *Ld. Adv.* v. *Wilson*, 1857, 2 Irv. 626.
[14] *Ld. Adv.* v. *Robertson*, 1850, Shaw (J.) 447.
[15] *Ld. Adv.* v. *Hay*, 1858, 3 Irv. 181.
[16] *Ld. Adv.* v. *Goodall*, 1888, 15 R. (J.) 82.
[17] *Ld. Adv.* v. *Davidson*, 1829 Shaw 207; *Ld. Adv.* v. *Mahler and Berrenhard*, 1857, 2 Irv. 634; and *Ld. Adv.* v. *M'Millan*, 1858, 3 Irv. 213.

magistrate alone is entitled to ask the accused questions to clear up the statement he volunteers,[1] neither the accused's agent nor the public prosecutor having any right to put questions.[2] Where the Court is satisfied that the accused may have suffered prejudice, the declaration will be excluded.

[1] *Ld. Adv.* v. *M'Lachlan*, 1862, 4 Irv. 220.
[2] *Ld. Adv.* v. *Brims*, 1887, 1 White 462.

ADMONITION.

See CRIME (PUNISHMENT).

AD OMNIA VEL MALE APPRETIATA.

See CONFIRMATION OF EXECUTORS; EXECUTOR.

ADOPTION

OF CHILD. *See* PARENT AND CHILD.
OF CONTRACT. *See* AGENCY; PERSONAL BAR.
OF DEED. *See* DEED.

ADULTERATION.

See FOOD AND DRUGS.

ADULTERY.

See CRIME; DIVORCE.

ADVENTURE, JOINT.

See ACTION; PARTNERSHIP.

ADVERSE POSSESSION.

See PRESCRIPTION.

ADVERTISEMENT.

See COMPANY; CONTRACT; DESIGNS; PROCEDURE; TRADE MARKS.

INDECENT. *See* CRIME.

RATING OF. *See* VALUATION AND RATING.

AD VITAM AUT CULPAM.

See MAXIMS; OFFICE.

ADVOCATE.

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Introductory.

432. In Scotland the term "advocate" has come to be properly appropriated to one who is a member of the Faculty of Advocates. His status in Scotland is equivalent to that of a barrister in England. Members of a body of solicitors in Aberdeen are styled advocates, but have none of the privileges peculiar to members of the Faculty of Advocates, and, like other solicitors, are legally qualified to plead in the inferior Courts only, and in the Bill Chamber of the Court of Session.

Section 1.—History.

433. Before the Faculty of Advocates existed litigants frequently were represented by their friends or relatives, but professional pleaders were also commonly employed. Many old statutes show that the profession was well recognised. Examples are (1) an Act [1] "anent complaintes to be decided before the Judge Ordinar," providing that, "gif there bee onie puir creature, for fault of cunning or dispenses, that cannot, nor may not follow his cause, the King, for the love of God, sall ordaine the judge, before whom the cause suld be determined, to purwey and get a leill and a wise advocate to follow sik puir creatures causes . . ."; (2) an Act [2] which proclaims that "advocates and forespeakers in temporal Courts before being heard in a cause, shall swear that they believe the cause to be good, and if the party be not present shall swear for him" a prescribed oath; and (3) an Act [3] dealing with "the maner of arrayments for the Parliament," which ordains "all men that are forespeakers for the coist to have habits of greene" . . . "and quhilk of the forespeakers that wants it in that time of the said Par-

[1] 1424, c. 45. [2] 1429, c. 125. [3] 1455, c. 47.

liament or several counscles, the said habits and afterwards speakis for meed, sall pay five pounds to the King." The powers and duties of advocates in these early times were in many respects similar to those which advocates have now,[1] and while some of their present powers and duties are defined by statutes and Acts of Sederunt, others result from development of ancient law and practice.

434. By the Act [2] of 1532 which established in Scotland the College of Justice (otherwise called the Court of Session) the Faculty of Advocates was instituted. Sec. 64 of that Act declares " that there be ane number of advocates and procuratoures chosen, and to be chosen to the number of ten persones, that sall be called general procuratoures of the Councel " (then follow the names of eight persons) ; " and gif ony uthers cunning men will desire to be admitted to the office of advocation and procuration, they sall be received with advise of the said Lordes, for completing of the said number, and that thir procuratoures foresaidis procure for everie man for their wages bot gif they have reasonable excuse."

435. Advocates were not allowed in criminal cases till 1587, when an Act [3] was passed annulling previous prohibitory Acts and legalising such employment. Originally no special qualifications were required for admission to the Faculty. The Court admitted those whom they thought fit. This gave rise to abuses ; and by Act of Sederunt [4] in 1619 (passed in consequence of a petition of the Faculty) an examination and thesis in civil law were prescribed, and became the ordinary mode of admission, but admission extraordinarily " by a Bill to the Lords," without examination, continued to exist as an alternative mode for many years. Various Acts of Sederunt, however, modified the terms of admission by the " extraordinary " mode, and even privileged intrants were compelled to undergo certain trials. By Act of Sederunt [5] in 1692 it was provided that the ordinary mode of trial would not be dispensed with unless the Court were informed of the person's fitness for the office, after which they remitted him to the Dean of Faculty for examination in Scots Law, and it is added, " that importunity may not prevail," " no person is to have the benefit of this Act who is cousin-germane or of nearer degree to any of the Lords." The interference of the Court came in time to be a mere formality, and the two classes of intrants were distinguished mainly by the fact that one passed in Civil and the other in Scots law.[6]

Section 2.—Present Regulations for Admission to Faculty.

436. Intrants are now admitted after examinations which proceed upon a remit from the Court following upon a petition presented by the

[1] Balfour, Practicks, 297 *et seq.* ; *Regiam Maiestatem*, iii. 15–19.
[2] 1532, c. 2 (record ed.) ; 1537, caps. 36–41 (12mo. ed.).
[3] 1587, c. 38. [4] A.S. 12th Feb. 1619. [5] A.S., 25th June 1692.
[6] Spottiswoode, Forms of Process, 45 ; A.S., 28th Feb. 1750.

intrant.[1] Guidance in the procedure is afforded by the Clerk of Intrants, Parliament House, Edinburgh. The examinations are conducted in accordance with regulations, approved by the Faculty upon 24th October 1919.

437. Private Examinations.—The examinators are nine members of Faculty, nominated by the Dean. The examination of intrants is partly written and partly oral.

438. The qualifications of intrants and subjects of examination are as follows: (i.) *General Scholarship.*—Every intrant is deemed duly qualified in general scholarship if he produce evidence that he has obtained: (1) the degree of Master of Arts of any of the Scottish Universities; or (2) the degree of Bachelor of Arts or Bachelor of Civil Law or Bachelor of Laws in any English University, Trinity College, Dublin, or the Royal University of Ireland; or (3) a pass in such examination as shall, in the opinion of the Dean and his Council, be evidence of the same amount of scholarship as that afforded by the degree of Master of Arts of a Scottish University. In the event of the intrant not having graduated as above, he is examined in the following subjects:—(1) Latin; (2) Greek, or (in the intrant's option) one of the following languages, viz. French, German, Italian; (3) Mathematics, or Natural Philosophy, or Chemistry; (4) Metaphysics and Logic, or Moral Philosophy and Logic; (5) History of the United Kingdom. (ii.) *Law.*—After the intrant has been found qualified in general scholarship, he is examined on (1) the Civil Law; (2) Philosophy of Law and International Law—Public or Private; (3) Constitutional Law and History; (4) Medical Jurisprudence; (5) Scots Law, Civil and Criminal, including Procedure; (6) Conveyancing. Prior to examination in any subject, the intrant must produce (1) evidence of attendance, such as is required for admission to examination for a law degree, in a class of Scots Law, and a class of Conveyancing in a Scottish University; (2) evidence of the like attendance in a class of (*a*) Civil Law, (*b*) Philosophy of Law and International Law—Public or Private, (*c*) Constitutional Law and History, in a Scottish University, or such attendance in another University or school of law as may seem to the Dean and his Council to be equivalent thereto; (*d*) Medical Jurisprudence, in a University, or in a school recognised as qualifying for University degrees. If the intrant has obtained the degree of LL.B. from a Scottish University after examination in all the subjects above prescribed for examination in law, he will be held qualified in general scholarship and law, without examination or other evidence thereof; provided always that in cases where the LL.B. degree has been obtained without examination in procedure or criminal law, or both, it is necessary for the candidate to be examined in the omitted subject or subjects. The intrant must pass in at least two subjects at one time, except where he has passed in all subjects but one. The

[1] C.A.S., A, vi. 1.

examinators publish (with concurrence of the Dean of Faculty) the names of the books on which examinations shall be held. An intrant may be exempted from examination in any subject, whether in general scholarship or in law, on his producing evidence that he has passed an examination in that subject, the standard of such examination being at least as high as that of the M.A. and LL.B. degrees respectively. There are five periods for the examination of intrants in each year, viz.—(1) the last Friday in October; (2) the last Friday but one before the rising of the Court for the Christmas recess; (3) the last Friday but one before the rising of the Court in March; (4) the last Friday in May; and (5) the last Friday but one before the rising of the Court in July, along with in each case the Monday and Tuesday immediately preceding. But the Dean and the examinators have power, in special cases, to fix a diet for examination at any other period. The written examinations are held on the Mondays and Tuesdays, and the oral on the Fridays above mentioned. Gentlemen proposing to attend any examination must give notice to the Clerk of Intrants at least ten days before the first day of the examination, but the private examinators on special cause shewn may dispense with the notice.

439. Public Examination.—After the intrant has passed the private examinations, the Dean pronounces an order assigning a title of the Pandects to him for the subject of a thesis, which he appoints him to lodge with the Clerk of Intrants on a particular day, naming a subsequent day for the diet of his public examination. The thesis is submitted by the Clerk to two of the members of Faculty who have examined the intrant on Civil Law, and, if satisfied, they affix their *Impugnetur*. An intrant is not permitted to proceed to public examination until he shall have satisfied the Dean that during the year before such examination he has not been engaged in any trade, business, or profession, either on his own account or as assistant to or in the employment of another. This regulation does not prevent an intrant from being a pupil under a member of Faculty during the said year, nor from engaging in practice as a member of the English or Irish Bar. If the thesis, on being impugned, shall have been satisfactorily defended by the intrant, the question as to his admission is decided by the Faculty, voting by ballot. Intrants when admitted take the oath of allegiance before a Lord Ordinary.[1]

440. Dues.—The sums payable by an intrant on presentation of the petition are (1) entry money, £300; (2) Faculty dues, £15; (3) to Widows' Fund, £70; and for stamp on petition, £2. On admission to the Faculty, he must pay (4) £50, being stamp duty[2] (remitted if the intrant be an English barrister; if an Irish barrister, £10 is chargeable). There is no remission of that duty in the case of an intrant who has been an enrolled law agent; (5) Faculty and examination dues, £35; (6) age-tax, amounting to £6, 12s., £8, 16s., or £11 (according to class of

[1] C.A.S., A, vi. 3. [2] 54 & 55 Vict. c. 39.

annuity selected in Widows' Fund), imposed, whether the intrant is male or female, for each year of age above twenty-four at the date of admission. Examiners' fees (£1, 11s. 6d. for each subject) are also payable by the intrant.

Section 3.—Officials.

441. 1. *The Dean of Faculty.*—The head of the Faculty is the Dean, who presides at the meetings, and signs its minutes and other acts. He leads in Court all other members of the Bar, excepting the Lord Advocate, and is usually consulted upon any doubtful point of professional practice or etiquette. 2. *The Vice-Dean* officiates in the absence of the Dean. 3 & 4. *The Treasurer and the Clerk* are, like the Dean and the Vice-Dean, elected annually at the anniversary meeting of the Faculty, held on the second Wednesday after the Christmas recess. 5. *Advocates for the Poor.*—By Act of Sederunt [1] the Faculty is ordained to appoint six of its number annually to be Advocates for the Poor. These are appointed at the anniversary meeting, and hold office for one year. The six members of the Faculty, of those willing to accept the office, who are next in seniority to the most junior of the retiring six, are appointed. Though at one time a salary of £10 was provided,[2] counsel for the poor now give their services gratuitously, unless expenses in a cause are awarded to their client, in which case counsel's fees are chargeable against the opposite party.

Section 4.—King's Counsel.

442. The status of King's Counsel has long been conferred upon members of the English, Irish, and Colonial Bars, whereby barristers eminent in practice or in legal attainment are appointed Counsel to the Crown, and called within the Bar. Until 1897, the status was not recognised at the Scottish Bar, and, with the exception of law officers of the Crown and Deans of Faculty, none received the honour. It was felt, however, that distinguished members of the Scottish Bar who had occasion to collaborate with English, Irish, or Colonial barristers in the Judicial Committee of the Privy Council, the House of Lords, or before Parliamentary committees, were put in a false position when those brethren of other Bars who happened to be King's Counsel took precedence of them, and it was accordingly resolved by the Faculty of Advocates to petition His Majesty to create a roll of King's Counsel in Scotland similar to those kept in England and Ireland. A petition was accordingly presented in the summer of 1897, and its prayer was shortly thereafter granted.

At the Scottish Bar the names of those to be promoted to the rank and dignity of King's Counsel are laid before His Majesty by the

[1] A.S., 16th Jan. 1819. [2] A.S., 2nd March 1534.

Secretary for Scotland, upon the recommendation of the Lord Justice-General for Scotland, and letters patent are granted to those whose names are so approved. An advocate desiring to receive the honour must apply for it in the following form :

To the Right Honourable the Lord Justice-General for Scotland.

My Lord,—I have respectfully to request your Lordship to recommend me to His Majesty, through the Secretary for Scotland, for appointment as one of His Majesty's Counsel.—I am, my Lord, your obedient servant,

. . . . . .

Before making the above application he must give notice that he intends to apply to all those members of the Bar who are his seniors, and have not attained the honour.

443. The etiquette regarding the rights and duties of King's Counsel is to a large extent unwritten, and, in Scotland at least, still a little uncertain. Here, as in England, the rule seems to hold that they must not be employed against the Crown without special licence, which is not refused unless the Crown desires to be represented by the King's Counsel concerned. They are " senior counsel," and cannot appear in a case without an accompanying junior. This, of course, applies only to cases in the public Courts. They may accept instructions to appear without junior counsel in arbitrations, and opinions may be given by them without aid of junior counsel. King's Counsel (other than the chief law officers of the Crown) do not, as in England, sit within the Bar, but they take precedence of their seniors at the Bar who are not King's Counsel in the conduct of a case. The order of precedence in Court is : (1) the Lord Advocate, who sits on the right side of the clerks' table, within the Bar ; (2) the Dean, whose seat is in the centre of the Bar ; (3) the Solicitor-General, sitting on the left side of the clerks' table, within the Bar ; (4) ex-law officers of the Crown ; (5) other King's Counsel, according to the dates of their respective patents. King's Counsel must not draw or revise pleadings in cases in Court unless junior counsel are instructed. Before Provisional Order Tribunals, in Board of Trade and other departmental inquiries and Royal and Parliamentary Commissions, King's Counsel should be accompanied by juniors.[1]

Section 5.—Library.

444. Under the National Library of Scotland Act, 1925,[2] the contents of the Advocates' Library, excepting the Faculty's collection of law books, legal manuscripts and papers, records, pictures and furniture, were transferred to the Board of Trustees constituted for the purposes of that Act.

[1] Minutes of Faculty of Advocates, Feb. 7, 1907.
[2] 15 & 16 Geo. V. c. 73.

Section 6.—Powers and Duties of an Advocate.

Subsection (1).—*Instructions and Retainers.*

445. An advocate is entitled to plead in every Court in Scotland, civil, ecclesiastical, or criminal, superior and inferior (except when debarred by statute, as by the Small Debt Acts) ; also before the House of Lords, the Judicial Committee of the Privy Council and Parliamentary Committees. It is contrary to professional rules for an advocate to act except upon the instructions of a qualified law agent. A client employs an enrolled law agent, who instructs counsel. " No advocate, without very good cause, shall refuse to act for any person tendering a reasonable fee, under pain of deprivation of his office as advocate." [1] " Very good cause " has not been judicially defined ; but it seems clearly to cover the holding by counsel of a retaining fee. Retainers are (1) *special,* which are given with reference to a particular action only ; (2) *implied, e.g.* by employment to draw or revise pleadings or to appear for a party in Court ; or (3) *general,* whereby the services of the counsel retained are secured in all cases in Scottish Courts civil or criminal (except Police Courts and Licensing Courts of Justices), but not in Appeals to the House of Lords or in arbitrations in which the person retaining him is interested as a party. From time to time, rules prescribing the amounts of retainers ; the modes of giving them ; their duration ; their preferences, *inter se,* and their scope have been formulated by the Dean of Faculty.

446. A special retainer endures for a year, but must be renewed before the expiry of each year, except in the case of a depending process. In a depending process a special retainer gives to the client a right to the services of the counsel retained throughout the whole progress of the cause : but if the counsel retained is not employed in any step of the cause in which, according to ordinary practice such counsel, junior or senior, as the case may be, would be employed, the retainer falls and the counsel is bound to accept a retainer or employment, if offered, on the opposite side of the case. When a counsel is consulted merely concerning the merits of a case, or gives advice, oral or written, regarding the raising of an action, intended or threatened, he is not thereby retained in the case.

447. A general retainer endures for the lifetime of the client and counsel, subject, however, to this condition, that if the client becomes a party to any action or process after the general retainer is given and does not employ the counsel who holds his general retainer, the retainer falls *eo ipso,* not merely as regards the particular case, but absolutely and to all effects. If a special retainer be offered to a counsel, or such instructions or employment in a cause as imply a special retainer, against a party for whom he holds a general retainer, it is the duty of his clerk forthwith to intimate this to the agent of the party for whom he is

[1] C.A.S. A, vi. 4.

retained in general, who may then send a special retainer applicable to the particular case, and is in that event entitled to a preference over the prior special retainer, or implied special retainer, on the other side: But if the agent of the party who has given the general retainer fails upon such notice to send a special retainer, it is the duty of the counsel to accept the special retainer or instruction or employment offered on the other side.

448. General retainers are preferable according to their dates. If a counsel holds a general retainer for the pursuer and also a general retainer for the defender of an action, he will be bound to act for that party whose general retainer is earlier in date, provided that party avails himself of his preference by sending a special retainer applicable to the case. If the first special retainer comes from the party whose general retainer is later in date, notice must be given to the party having the preference, as already explained, and that party must forthwith send his special retainer, otherwise the counsel will be bound to accept the special retainer of the party whose general retainer is later in date.

Subsection (2).—*Mandate.*

449. An advocate does not require to produce any mandate. His gown is his mandate, *i.e.* he is presumed to have a mandate from his appearance in Court.[1] If he appears and acts in *bona fide* for a party at the desire of a practising agent, he is not responsible for the consequences of the agent's acting without authority.[2] A party for whom such unauthorised appearance is made is bound by a decree against him, and is liable in expenses, but these he may recover from the agent; and he has always a remedy against those who have used his name without his authority.[3] An advocate's mandate, once given, is presumed to continue, and it covers all acts of discretion in the conduct of a case. At one time a special mandate was necessary to authorise certain acts, such as compromising[4]; but it is now settled that "unless there be something very special in his instructions, a counsel is always entitled to give up a defence, or abandon a claim," and "may make an absolute surrender of his client's case."[5] The law in England is the same.[6]

450. Lord President Inglis laid down the law on this subject thus[7]: "An advocate, in undertaking the conduct of a cause in this Court,

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[1] Ersk. Inst. iii. 3, 33.

[2] *Wallace* v *Miller*, 1821, 1 S. 40 (N.E. 43).

[3] *Hamilton* v. *Marshall*, 25th Nov. 1813, F.C.; *Cowan* v. *Farnie*, 1836, 14 S. 634; *Thomson* v. *Candlemakers of Edinburgh*, 1855, 17 D. 774.

[4] Balfour, Practicks, 298.

[5] L.P. Inglis in *Duncan* v. *Salmond*, 1874, 1 R. 329; see also *Royal Bank of Scotland and Ors.*, 1830, 8 S. 424; *Gilfillan* v. *Brown*, 1833, 11 S. 548; *Gordon* v. *His Creditors*, 1834, 12 S. 401; *Currie* v. *Glen*, 1846, 9 D. 308; *Mackintosh* v. *Fraser*, 1860, 22 D. 421.

[6] *Strauss* v. *Francis*, 1866, L.R., 1 Q.B. 379.

[7] *Batchelor* v. *Pattison and Mackersy*, 1876, 3 R. 914, at p. 918.

enters into no contract with his client, but takes on himself an office in the performance of which he owes a duty, not to his client only, but also to the Court, to the members of his own profession, and to the public. From this it follows that he is not at liberty to decline, except in very special circumstances, to act for any litigant who applies for his advice and aid; and that he is bound, in any cause that comes into Court, to take the retainer of the party who first applies to him. It follows also that he cannot demand or recover by action any remuneration for his services, though in practice he receives *honoraria* in consideration of these services. Another result is, that while the client may get rid of his counsel whenever he pleases and employ another, it is by no means easy for a counsel to get rid of his client. On the other hand, the nature of the advocate's office makes it clear that in the performance of his duty he must be entirely independent, and act according to his own discretion and judgment in the conduct of the cause for his client. His legal right is to conduct the cause, without any regard to the wishes of his client, so long as his mandate is unrecalled; and what he does *bona fide* according to his own judgment will bind his client, and will not expose him to any action for what he has done, even if the client's interests are thereby prejudiced. These legal powers of counsel are seldom, if ever, exercised to the full extent, because counsel are restrained, by considerations of propriety and expediency, from doing so."

451. While counsel's mandate gives him complete authority over the suit, it does not give him power over matters not within the scope of the action.[1] It has been doubted whether counsel has power, without special authority, to enter into a reference of the cause in which he is employed. Lord Justice-Clerk Hope expressed the opinion that "there is no doubt that counsel appointed to conduct a cause in Court cannot refer it, if such reference is beyond the mere ascertainment of accounts";[2] but an opinion *per contra* was expressed by Lord Campbell in the House of Lords.[3] It is now thought that power to refer the whole cause is within counsel's mandate.[4]

Subsection (3).—*Liability for Incorrect Advice.*

452. An advocate is not liable in damages for incorrect advice, nor is an agent who acts upon the advice of counsel in matters connected with the conduct of a suit.[5]

Subsection (4).—*Fees.*

453. An advocate's fees are regarded as *honoraria*. They are presumed to have been paid and ought to be sent when he is instructed;

[1] *Wauchope* v. *N.B.R. Co.*, 1863, 2 M. 326.
[2] *Stewart* v. *Hickman*, 1843, 6 D. 151, at p. 158.
[3] *Mackenzie* v. *Girvan*, 1843, 2 Bell's App. 43.
[4] Bell, Prin. s. 219.
[5] *Megget* v. *Thomson*, 1827, 5 S. 275 (N.E. 256); *Burness* v. *Morris*, 1849, 11 D. 1258; but cf. *Dixon* v. *Rutherford*, 1863, 2 M. 61.

if not, he cannot ordinarily recover them by action.[1] But a salary as standing counsel may be sued for [2]; and when no fee has been sent to counsel (including counsel for the poor) for a particular piece of business in a cause, it may be sent afterwards and made a charge against the opposite party, who has been found liable in expenses.[3] Action is competent for recovery of counsel's fees which have been received by an agent but not paid to counsel.[4] Either because his fees are *honoraria* or because some services are presumed to have been rendered, an advocate is probably entitled to retain fees sent for services which he does not render.[5] An agreement by an advocate to take a proportion of the subject of the suit in place of a fee is illegal. By an old Act,[6] it is not lawful for an advocate to buy any debatable rights, heritable or moveable, which are in dependence, and remain undecided.

Subsection (5).—*Privilege and Confidentiality.*

454. Advocates are absolutely privileged in their written pleadings as well as in speaking in Court, in commenting on the evidence and conduct of parties, and in all other matters, if pertinent to the cause, and no action for defamation or verbal injury will lie against them. "Otherwise there would be no security that the judge had heard everything he ought to hear" [7] While a counsel has an absolute privilege, the privilege of a litigant is qualified, and an action will lie against him if the pursuer undertake to shew that the defamatory statements were not made honestly for the purpose of litigation, but from motives of personal malice.[8]

455. Communications between a party and his legal adviser regarding the subject of a suit, and anything learned by that legal adviser in the course of his employment, are secure from disclosure: but where knowledge has been obtained otherwise than as the result of employment by the client, it must be disclosed. Thus in a proving of the tenor, defender's advocate was bound to depone whether he saw the writ and what its tenor was, but not to divulge anything communicated to him which could not appear from the writ itself.[9] In England it has been laid down that the privilege of confidentiality is not "qualified by any reference to proceedings pending or in contemplation" [10]; but it is doubtful how far this applies to Scotland. Memorials to and opinions of counsel are

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[1] *Batchelor* v. *Pattison and Mackersy*, 1876, 3 R. 914.
[2] *M'Kenzie* v. *Town of Burntisland*, 1728, Mor. 11421.
[3] *Sim* v. *Scottish National Heritable Property Co., Ltd.*, 1889, 16 R. 583.
[4] *Cullen* v. *Buchanan*, 1862, 24 D. 1132; *Keay* v. *A.B.*, 1837, 15 S. 748 (note); 9 Jur. 53.
[5] Mackay, Manual of Court of Session Practice, 28.
[6] 1594, c. 220.
[7] *Drew* v. *Mackenzie & Co.*, 1862, 24 D. 649, per L. Deas at p. 662; *Moodie* v. *Henderson*, 1800, Mor. 360; *Williamson* v. *Umphray and Robertson*, 1890, 17 R. 905.
[8] *Williamson* v. *Umphray and Robertson*, *supra*.
[9] *Wamphray's Trs.* v. *Wamphray*, 1675, Mor. 347.
[10] *Cromack* v. *Heathcote*, 1820, 2 Brod. & Bing. 4; *Greenough* v. *Gaskell*, 1833, 1 My. & K. 98; *cf.*, however, *The Queen* v. *Cox and Railton*, 1884, 14 Q.B.D. 153.

protected.[1] The privilege of confidentiality is in the interests of the client, and if he waives it, as by putting his counsel or agent into the witness-box, the privilege is at an end.[2] A legal adviser is bound to produce all writings his client would have been bound to produce, and to answer questions regarding them which his client would have been bound to answer. An advocate, in an exhibition of writs, was held bound to depone, as a witness, anent defender having the writs, although he was defender's counsel in the cause.[3] Anything which forms part of the *res gestæ* of a crime or fraud is not protected.[4] In preparations for defence, when proceedings in respect of such fraud or crime have been instituted, the usual rule of privilege applies.[5] The authorities upon the subjects of privilege and confidentiality are more fully dealt with in other sections of the work. (See CONFIDENTIAL COMMUNICATIONS : DEFAMATION.)

SUBSECTION (6).—*Where Counsel necessary, etc.*

456. A party is always entitled to plead his own cause orally in any Court ; but if he elects to plead himself, counsel will not be heard for him in addition.[6] The rule is different concerning papers in the Court of Session, which, with few exceptions, must be subscribed by counsel. The signature of the party is not sufficient.[7] Counsel being held responsible for the pleadings, the Court requires that he shall satisfy himself that papers signed by him are proper to be laid before it.[8] Exceptions to the rule are summonses (which must be signed by a W.S.), Bill Chamber proceedings, and minutes of admission, which are commonly signed by agents.[9] Special cases should be signed by the counsel " by whom they have been adjusted, the paper being one which contains a joint statement binding on both parties." [10] The same principle applies to joint minutes embodying settlements. Appeals to the House of Lords should be signed by the counsel who prepared them ; but, as a rule, one advocate may sign a paper for another. Minutes of restriction in an undefended action may be signed by an agent.[11] Adjustments are in practice initialed by junior counsel on the principal summons or defences and other writs upon which adjustments are permitted by the Court.

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[1] Bell, Prin. s. 2254 ; *Thomson's Trs.* v. *Clark*, 1823, 2 S. 262 (N.E. 233) ; *Clark* v. *Spence*, 1824, 3 Murray 450, at p. 455.

[2] 15 & 16 Vict. c. 27, s. 1 ; *Forteith* v. *Earl of Fife*, 1821, 2 Murray 467.

[3] *Betson* v. *Lord Grange*, 1628, Mor. 342.

[4] *M'Cowan* v. *Wright*, 1852, 15 D. 229, 494.

[5] Dickson on Evidence (Grierson's Ed.) s. 1663 *et seq.*

[6] *Longworth* v. *Yelverton*, 1867, L.R., 1 Sc. App. 218, at p. 220.

[7] C.A.S. A, iii. 14 and 15 ; H, i. 6 ; *Hay* v. *Perth Baking Co.*, 1823, 2 S. 107 (N.E. 101) ; *Sassen* v. *Campbell*, 1831, 9 S. 562 ; *Rennie* v. *Murray*, 1850, 13 D. 36 ; *Denny* v. *Macnish*, 1863, 1 M. 268 ; *Watt* v. *Johnston*, 1863, 1 M. 269 (note) ; *Jaffray* v. *Jaffray*, 1863, 2 M. 355 ; 31 & 32 Vict. c. 100, s. 20.

[8] 1855, 18 D. 33 (note) ; *Denny* v. *Macnish, supra.*

[9] 31 & 32 Vict. c. 100, s. 13 ; *Scott* v. *Anstruther*, 1848, 10 D. 732.

[10] *Hope, etc.*, 1870, 8 M. 699, per L.P. Inglis at p. 702.

[11] 31 & 32 Vict. c. 100, s. 23.

SUBSECTION (7).—*Attendance in Court.*

457. In no case is it necessary that more than one counsel should be instructed, but the practice is to instruct two for the Inner House, and it has been laid down that, "where one counsel only is retained, his absence will not be esteemed a good reason for delay." [1] Where only one counsel was instructed, who did not appear to plead owing to his being engaged in the other Division, the case was sent to the bottom of the Roll, the Lord President observing that the party being a public functionary, there was no excuse for the ordinary rule not being observed.[2] It has also been laid down that "the fact of counsel being engaged in a proof will not be taken as an excuse for not appearing in the Division." [3] Engagement in a jury trial or before a Lord Ordinary is in the same position. Usually in contested cases junior counsel for the pursuer or appellant or reclaimer opens the case; junior counsel on the other side replies, if called upon; then senior counsel, in similar order, may be asked to address the Court.

458. The rules regarding attendance of counsel in the Outer House are [4]: "(*a*) When a cause is called either in the debate or procedure roll, and no counsel attends on either side and no admissible excuse is made for their non-attendance, the Lord Ordinary shall pronounce an interlocutor dismissing the action, and finding neither party entitled to expenses; and the said interlocutor shall not be recalled by the Lord Ordinary of consent, but may be recalled only on reclaiming note to the Inner House, upon such conditions as to expenses or otherwise as may be imposed by the Court, or by the Lord Ordinary under remit. (*b*) When, on such calling of a cause, counsel shall appear on one side only, and no admissible excuse shall be made for the non-attendance of counsel on the other side, it shall be competent for the counsel appearing to take decree by default in favour of his client; and if he shall not do so, the Lord Ordinary shall pronounce an interlocutor dismissing the action, finding neither party entitled to expenses; and the said interlocutor shall not be recalled by the Lord Ordinary of consent, but may be recalled only in the manner and on the conditions foresaid. (*c*) It shall not be competent to have such decree by default recalled of consent of parties, but the decree shall be recalled on a reclaiming note only; and, unless where the Court shall otherwise direct, the auditor shall, in taxing any account of expenses incurred to his agent by the party against whom such decree is taken, disallow the expenses of having such decree opened up. (*d*) No excuse in respect of another engagement shall be admissible for non-attendance of counsel on debate or procedure roll, except his being at the time engaged in a case before the Inner House, or before another Lord Ordinary, or in a proof or jury trial, and being

[1] *Forbes* v. *Mags. of Banff*, 1855, 18 D. 80, per L.P. M'Neill.
[2] *Kirk-Session of Wemyss* v. *Inspector of Poor of Wemyss*, 1855, 18 D. 273, per L.P. M'Neill at p. 274.
[3] *Wilson* v. *Mann*, 1876, 3 R. 527.
[4] C.A.S. C, ii. 9.

sole counsel on his own side in attendance, or, if not sole counsel, being the counsel addressing the Court or jury, or examining a witness, or being about to reply to the counsel on the other side. (*e*) Every debate shall be proceeded with and brought to a close by the counsel at the time in attendance ; and, except on special cause shewn, no delay or adjournment of any debate shall be allowed. But it shall be always competent to the Lord Ordinary, on special cause shewn, to continue or adjourn any debate to another day, not more than eight days afterwards, when the debate shall be proceeded with and completed by the counsel then in attendance. (*f*) No counsel shall be entitled to leave the Lord Ordinary's Bar on the ground that he be called to a proof or jury trial, or to a cause in the Inner House, unless he be the sole counsel engaged in the said proof, jury trial, or cause in the Inner House, or unless the services of the other counsel, if any, engaged along with him, cannot, for reasons stated to and held satisfactory by the Lord Ordinary, be obtained at the time."

459. A sheriff is debarred from acting as an advocate before any of the King's Courts at Edinburgh, or at the Circuit Court, in any cause civil or criminal arising within or coming from his sheriffdom.[1] An advocate should not appear in an appeal to defend the judgment of a Court in which he has acted as legal assessor.[2] It is the duty of counsel in the House of Lords to cite statutory provisions and authorities known by him to bear upon the question at issue, whether those provisions or authorities are or are not in favour of the party for whom they are appearing.[3]

Subsection (8).—*Discipline.*

460. Counsel is liable to censure for improper conduct (*e.g.* using insulting language to the Court) by any judge before whom he is pleading.[4] The Court of Session may punish by censure, suspension, or deprivation.[5] Offences held punishable are (1) the buying of pleas, or of property *pendente lite*,[6] contempt of Court, and signing appeals solely for the purpose of delay. The Faculty exercises a supervision over its members, and may censure, or even strike off its rolls, any member guilty of professional or other misconduct.

Section 7.—Advocates' Clerks.

461. Each advocate has a clerk, whose duties are to attend him in Court, copy papers, etc. His fees are payable by the agent instructing counsel, and the rates thereof are specified by Act of Sederunt.[7]

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[1] 7 Edw. VII. c. 51, s. 21.

[2] *Somerville* v. *Directors of Edinburgh Assembly Rooms*, 1899, 1 F. 1091.

[3] *Glebe Sugar Refining Co., Ltd.* v. *Greenock Harbour Trs.*, 1921 S.C. (H.L.) 72, per L. Ch. (Birkenhead) at p. 73.

[4] *Commissaries of Edinburgh* v. *Russell*, 1609, Mor. 341 ; *Mowat*, July 1, 1699, 2 Fountainhall, 56 ; *Gilchrist* v. *Macadam*, 1798, 4 Pat. App. 26.

[5] A.S. Dec. 21, 1649 ; July 26, 1699, and June 23, 1756.

[6] Act 1594, c. 26 (record ed.) ; c. 220 (12mo ed.).

[7] C.A.S. K, iv. 1 ; App. i. vi.

ADVOCATES-DEPUTE.

See LAW OFFICERS.

ADVOCATES IN ABERDEEN.

See LAW AGENT.

ADVOCATION.

See APPEAL (CIVIL).

ÆDIFICATUM SOLO CEDIT.

See FIXTURES; MAXIMS; PROPERTY.

ÆMULATIO VICINI.

See PROPERTY.

AFFIDAVIT.

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Section 1.—Nature and Form.

462. An affidavit is a written *ex parte* statement, emitted on oath, before one having authority to administer oaths. An affidavit may be emitted before any Magistrate, Judge Ordinary, or Justice of the Peace. It may be emitted before a Baron Bailie.[1] A Justice of the Peace may take an affidavit beyond the limits of the county to which his commission applies ;[2] and a Scottish Justice may take an affidavit even in England.[3] Conversely, an English or Irish Justice may act in this matter in Scotland ;[4] but in the case of *Place* v. *Dennison*[5] it was held "that a creditor's affidavit taken in a foreign country, and a long while previous to the application for the *meditatio fugæ* warrant, was not a sufficient ground for the apprehension of a debtor." The jurisdiction of a Judge Ordinary in the matter of taking affidavits is confined to his own territory.[6]

463. The following is the usual form of affidavit :—

> At , the day of , One thousand nine hundred and nine years ; in presence of *A. B.*, of C., one of His Majesty's Justices of the Peace for the County of , compeared *D. E.* [*design him*], who, being solemnly sworn, depones that [*insert the facts*]. All which is truth, as he [*or* as the deponent] shall answer to God.
>
> (Signed) *D. E.*
> (Signed) *A. B.*, J.P.

The affidavit ought to set forth all the particulars contained in the above style, and must be signed by the deponent, and also by the Justice, or Magistrate, or Judge Ordinary before whom it is emitted. A Justice ought to append the initials "J.P." to his signature. Where

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General Authorities.—Dickson on Evidence, ss. 1534 *et seq.*, 1725, 1118, 272 ; Kirkpatrick, Digest of Law of Evidence, s. 39.

[1] *Murray* v. *Phillips*, 1821, 1 S. 81 (N.E. 83).

[2] *Turnbull* v. *Smellie*, 1828, 6 S. 676.

[3] *Kerr* v. *Marquis of Ailsa*, 1852, 14 D. 864 (affd. 1 Macq. 736).

[4] *Taylor* v. *Little*, 1822, 1 S. App. Ca. 254.

[5] July 2, 1814, F.C.

[6] Bell, Com. 5th ed., ii. 346 ; Dickson, Evidence, s. 1539.

the affidavit consists of more than one page, each page ought to be signed both by the deponent and the Justice, etc., before whom it is taken. It is desirable to avoid, as far as possible, erasures, scorings, interlineations, and marginal additions. Where the amount of the debt was written on an erasure, the affidavit was held bad.[1] A marginal note unsigned by the Justice was held no part of the affidavit.[2] But where the interlineation was in the handwriting of the Justice before whom the affidavit was sworn, and corresponded to the amount in an annexed account, an objection to the validity was repelled.[3] The filling up of immaterial blanks in printed affidavits, where the meaning was otherwise clear, was held not fatal to validity.[4]

464. The words "*who being solemnly sworn, depones,*" are called the *jurat*. The deponent must actually appear before the Justice, Magistrate, or Judge Ordinary; and he *must be sworn*. If he is not put on oath, the affidavit will be invalid.[5] While the safe course is to swear that the statement in the affidavit is true, "as I shall answer to God," it would seem that the actual mention of the name of the Deity is not essential, if the word "swear" be used. In an unreported case [6] these formalities were held sufficient by the First Division of the Court of Session (L. Pres. Inglis), viz. (1) the reading over of the affidavit; (2) the holding up of his right hand by the deponent; and (3) the use of the words "I swear that this statement is true."

465. Where, however, a person objects to being sworn, and states as the ground of such objection either that he has no religious belief, or that the taking of an oath is contrary to his religious belief, he may make a solemn affirmation, instead of taking an oath, in all places and for all purposes where an oath is or shall be required by law; and this affirmation has the same force and effect as if he had taken an oath.[7] The form of affirmation in writing in lieu of an affidavit will be:—

> I, *D. E.*, of , do solemnly and sincerely affirm that [*insert statement of the facts affirmed; and thereafter, in place of the* jurat, *follow these words*]. Affirmed at [*specifying the place*], this day of 19 [*specifying the date*], before me [*name and designation of Justice, Magistrate, or Judge Ordinary, with signatures of deponent and Justice, etc.*].[8]

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[1] *White* v. *Girdwood*, 1846, 9 D. 283.

[2] *Mackersey* v. *Guthrie*, 1829, 7 S. 556; *Miller* v. *Lambert*, 1848, 10 D. 1419.

[3] *Dyce* v. *Paterson*, 1846, 9 D. 310.

[4] *Hair* v. *Berwick*, 1830, 8 S. 671.

[5] *Blair* v. *N.B. and Mercantile Insur. Co.*, 1889, 16 R. 325; see also *Wylie* v. *Kyd*, 1884, 11 R. 968, 820.

[6] *Aitken*, 1890, Journal of Jurisprudence, xxxiv. 617.

[7] Oaths Act, 1888 (51 & 52 Vict. c. 46), s. 1, repealing, *inter alia*, the Affirmation (Scotland) Act, 1865 (28 & 29 Vict. c. 9), and the Juror's Affirmation (Scotland) Act, 1868 (31 & 32 Vict. c. 39).

[8] 51 & 52 Vict. c. 46, s. 4.

Section 2.—Unnecessary Affidavits.

466. The practice of taking affidavits not acknowledged by law was long since condemned as useless and improper[1]; and by the Act 5 & 6 Will. IV. c. 62, s. 13, it is declared to be not lawful for any Justice of the Peace, or other person, "to administer, or cause or allow to be administered, or to receive or cause or allow to be received any oath, affidavit, or solemn affirmation, touching any matter or thing whereof such Justice or other person hath not jurisdiction or cognisance by some statute in force at the time being"; but this enactment does not extend to any oath, etc., before any Justice "in any matter or thing touching the preservation of the peace, or the prosecution, trial, or punishment of offences, or touching any proceedings before either of the Houses of Parliament, or any committee thereof respectively," nor to any oath, etc., which may be required by the laws of a foreign country to give validity to instruments in writing designed to be used in such foreign country.

Section 3.—Admissibility in Evidence.

467. An affidavit is usually admissible in evidence, without extrinsic proof of its genuineness, for the limited purpose of enabling a party to establish a *prima facie* foundation for a claim which he must afterwards substantiate by other evidence. But as the person against whom the affidavit is used has no opportunity of cross-examining the deponent, an affidavit is not admissible on the merits of the case, nor is it admissible after the death of the deponent,[2] or when he is abroad and refuses to give evidence before a Commissioner of the Court.[3]

Section 4.—Perjury.

468. Voluntary affidavits do not warrant a prosecution for perjury,[4] but a false affidavit to a claim in bankruptcy infers the crime.[5] See Crime.

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[1] Hume, i. 364, ii. 135; Tait, *s.v.* "Affidavit"; Blair, 7.

[2] Kirkpatrick, Digest of Evidence, s. 39.

[3] *Magistrates of Aberdeen* v. *More*, 1813, Hume, 502; *Glyn, Mills, Halifax & Co.* v. *Johnston*, 1834, 13 S. 126; cp. *Lauderdale Peerage*, 1885, L.R. 10 App. Ca. 692; and *Shields* v. *N.B. Rly. Co.*, 1874, 2 R. 126; Dickson, Evidence, ss. 1535, 1717; Kirkpatrick, s. 207.

[4] Macdonald, 3rd ed., 215; Burnett, Crim. Law, 205; Hume, i. 370; Alison, i. 471.

[5] Hume, i. 374, note and cases there.

AFFILIATION.

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Section 1.—Introduction.

469. Affiliation is the determination or ascertainment of a child's paternity. It may be conveniently dealt with under the following heads :—

1. Children born in wedlock.
2. Children born out of wedlock.
3. Period of gestation.

Section 2.—Children Born in Wedlock.

470. Children born in wedlock are presumed to have been begotten by the person to whom the mother is married, and consequently to be lawful children in accordance with the maxim *pater est quem nuptiæ demonstrant*. This presumption applies to the case of a child born more than six months after the date of the marriage, or less than ten months after its dissolution. It is also applicable to a child born within six months after the date of the marriage if the husband knew that the woman was pregnant when he married her.[1] But it does not apply to an irregular marriage until such marriage has been formally declared. Nor is it applicable where parties are not living in the married state and the *de quo queritur* is whether there was a marriage or not.[2]

471. Formerly the presumption could only be overcome by proving that it was physically impossible for the husband to be the father of the child to which his wife gave birth, in respect either that he was impotent and incapable of procreation, or that he had no access to his wife during the period of gestation. Now the presumption can be rebutted by such evidence as is sufficient to satisfy the judicial mind that the husband is not the father of the child.[3] If there is clear evidence that *de facto* a husband had not intercourse with his wife at or about the time of conception, the child will be held illegitimate although intercourse was physically possible. But to overcome the

[1] *Gardner* v. *Gardner*, 1877, 4 R. (H.L.) 56 ; *Kerr* v. *Lindsay*, 1899, 18 R. 365.
[2] *Dean's Judicial Factor* v. *Deans*, 1912 S.C. 441, per Lord President Dunedin at p. 450.
[3] *Mackay* v. *Mackay*, 1855, 17 D. 494.

presumption of legitimacy, the evidence must be complete and satisfactory.[1]

472. The presumption may be redargued either by direct or by circumstantial evidence—the question always being whether the circumstances disclosed in evidence are such as to satisfy the Court that no sexual intercourse took place between the parties at a time which would account for the birth of the child.[2] A child has been held to be illegitimate although its mother and her husband at the time of conception lived in the same village.[3]

473. The concurring testimony of husband and wife that the child was not procreated by the husband is not in itself sufficient to elide the presumption. It might be in their interest to make such a declaration to the prejudice of the legal rights of the child as their own legitimate offspring. Such evidence, however, is admitted and considered along with the other proof in the case.[4]

Section 3.—Children Born out of Wedlock.

474. The question of the paternity of children born out of wedlock usually arises in actions of affiliation, in which the mother seeks to have the paternity established against the alleged father and to obtain a decree against him for aliment of the child and for the inlying expenses connected with its birth. Such actions are generally raised in the Sheriff Court. Prior to the Evidence Act of 1853[5] the parties to the action were not competent witnesses. The pursuer had to adduce a *semiplena probatio*, *i.e.* a proof sufficient to induce not merely a suspicion, but a reasonable belief that her case against the defender was well founded. That was done by proving acts of familiarity between the parties, suspicious circumstances, opportunity for connection at the time of conception, etc. Such proof was judged of according to the circumstances of each case.[6] If the *semiplena probatio* was established to the satisfaction of the Court, the pursuer was allowed to give her oath in supplement to prove that the defender was the father of her child, and, if affirmative, it was conclusive against him. If the oath was contradictory of the *semiplena probatio*, the defender was assoilzied.

475. Since the passing of the said Act the rules relating to *semiplena probatio* have been entirely superseded. By s. 3 of the Act the parties to the action are made competent witnesses. A *semiplena probatio* is no longer required. Evidence is led and dealt with as in

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[1] *Brodie* v. *Dyce*, 1872, 11 M. 142; *Tennent* v. *Tennent*, 1890, 17 R. 1205; *Coles* v. *Homer and Tulloh*, 1895, 22 R. 716.

[2] *Montgomery* v. *Montgomery*, 1881, 8 R. 403.

[3] *Steedman* v. *Steedman*, 1877, 14 R. 1066.

[4] *Tennent* v. *Tennent*, *supra*, per Lord M'Laren at p. 1223; *Gardner* v. *Gardner*, *supra*; *Kerrs* v. *Lindsay*, *supra*.

[5] 16 Vict. c. 20.

[6] *Mann* v. *Forrest*, 1850, 12 D. 1090.

other cases. The parties are the principal witnesses, and the Court has to consider the whole evidence and determine on which side is the balance of credibility. The *onus*, however, is on the pursuer to prove her case.[1] Her own testimony, however credible, is not sufficient. It must be corroborated by other evidence.[2]

476. Corroboration is usually found in acts of familiarity, in the parties being surprised in suspicious circumstances or in doing suspicious things. Mere opportunity for sexual intercourse at the date of conception does not alone amount to corroboration. But if opportunity be proved it may have a complexion put upon it by statements made by the defender which are proved to be false. Such false denials may be sufficient corroboration of the pursuer's evidence.[3] The fact that the defender has not tendered himself as a witness or led evidence to controvert material allegations made by the pursuer on her unsupported testimony is not to be regarded as an admission that the allegations are true and does not corroborate her evidence.[4] Where a defender admits an act of connection with the pursuer prior in date to the alleged act on which the pursuer founds, very little corroboration of the pursuer's evidence will be required, because the Court will readily infer that if opportunity occurs at a later date, the intercourse already begun will be repeated. Where, however, the act admitted by the defender is subsequent to the alleged act founded on, the Court will not infer from the admission that intercourse began at an earlier date, and the corroboration must be substantial.[5] Evidence of the general likeness of an offspring to its alleged father is inadmissible to prove paternity. But proof of certain definite physical peculiarities would appear to be competent.[6]

477. A pursuer does not require to prove that the defender was the only man who had intercourse with her. If the defender wishes to blame another man for the paternity of the child, he must make averments to that effect, and prove them.[7] If a woman has had connection with two or more men about the time at which her child was procreated there is no rule of law by which the Court must hold the person selected by her to be the father. The fact of promiscuous intercourse will not necessarily bar her from obtaining decree against the man whom she alleges to be the father, but it is a material circumstance to which due weight must be given in determining whether the pursuer has proved her case.[8]

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[1] *M'Bayne* v. *Davidson*, 1860, 22 D. 738; *Young* v. *Nicol*, 1893, 20 R. 768.

[2] *M'Kinven* v. *M'Millan*, 1892, 19 R. 369.

[3] *Macpherson* v. *Largue*, 1896, 23 R. 785; *Dawson* v. *Mackenzie*, 1908 S.C. 648; *M'Whirter* v. *Lynch*, 1909 S.C. 112; *Florence* v. *Smith*, 1913 S.C. 978.

[4] *Faddes* v. *M'Neish*, 1923 S.C. 443.

[5] *Buchanan* v. *Finlayson*, 1900, 3 F. 245; *Havery* v. *Brownlee*, 1908 S.C. 424.

[6] *Routledge* v. *Carruthers*, 20th January 1810, F.C.; *Grant* v. *Countess of Seafield*, 1926, S.L.T. 144.

[7] *Scrimgeour* v. *Stewart*, 1864, 2 M. 667; *Barr* v. *Bain*, 1896, 23 R. 1090.

[8] *Butter* v. *M'Laren*, 1909 S.C. 786; *Sinclair* v. *Rankin*, 1921 S.C. 933.

478. It is, or until recently was, a common practice in actions of affiliation for the pursuer to adduce the defender as her first witness. Such practice, although it may be defensible in exceptional circumstances, is not now regarded with approval by the Court. If it is resorted to and the defender's evidence is to be contradicted at a later stage by the pursuer's witnesses, and such contradiction is to be founded on as throwing suspicion on him, he must be warned that serious importance is to be attached to the evidence in question.[1]

479. As above stated, an action of affiliation contains conclusions for payment of aliment for the child and inlying expenses connected with its birth. The rate of aliment now granted is 4s. 6d. per week, and the inlying expenses are fixed at £2, 2s.[2]

Section 4.—Period of Gestation.

480. Questions as to the possible duration of pregnancy frequently arise in affiliation cases and also in divorce cases, where the husband is proved not to have had access to his wife during the period within which the child would naturally be conceived. The question is a medical and not a legal one, and is fully discussed in books on medical jurisprudence. But neither in law nor in medical science is it possible to fix an actual number of days as the extreme period of gestation.[3] The Court must deal with each case as it occurs. The condition of maturity or immaturity of the child is the best evidence as to whether it was or was not prematurely born. The ordinary period of gestation is about 280 days, but cases are reported in which the Court held on the evidence led that 297, 305, and 306 days respectively were not impossible periods of gestation.[4] On the other hand, 311 and 312 days respectively were held to be beyond the possible period.[5] It is a question of fact in each case. In England in a recent action of divorce by a husband against his wife, where the only evidence of adultery was the abnormal length of pregnancy, Lord Chancellor Birkenhead held on the medical evidence adduced that 331 days was not an impossible period of gestation.[6]

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[1] *M'Whirter* v. *Lynch*, *supra*; *M'Arthur* v. *M'Queen*, 1901, 3 F. 1010. Cf. *Darroch* v. *Kerr*, 1901, 4 F. 396.

[2] *Forbes* v. *Matthew*, 1919 S.C. 242.

[3] *Williamson* v. *M'Clelland*, 1913 S.C. 678, per Lord President Dunedin.

[4] *Whyte* v. *Whyte*, 1884, 11 R. 710; *Cook* v. *Rattray*, 1880, 8 R. 217; *Williamson* v. *M'Clelland*, *supra*.

[5] *Henderson* v. *Summers*, 1876, 3 R. 997; *Gibson* v. *M'Fagan*, 1874, 1 R. 853.

[6] *Gaskill* v. *Gaskill*, [1921 P. 425.

AFFINITY.

See MARRIAGE.

AFFIRMATION.

See AFFIDAVIT; OATHS.

AFFREIGHTMENT.

See CARRIAGE BY SEA.

AGE.

See CHILDREN AND YOUNG PERSONS; CONTRACT; CRIME; EDUCATION; FACTORY AND WORKSHOP ACTS; MINORS AND PUPILS; OATHS; PRESUMPTIONS; TUTORS AND CURATORS; WITNESS.

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481. The following sections are concerned, firstly, with those principles which are common to all forms of agency; and, secondly, with their application to the most important examples of that relationship. Other particular forms are treated of under their respective headings.

Section 1.—General.

Subsection (1).—*Definition and Nature of Agency.*

482. "An agent may be defined generally as one whom another puts in his place, or authorises or delegates to transact business for

General Authorities. Stair, i. 12; Bankton, i. 18, 1; Ersk. iii. 3; Bell's Commentaries (ed. M'Laren), i. 505–45; Principles (ed. Guthrie); Gloag on Contract, chap. viii.; Bowstead on Agency; Wilshere on Agency; Story on Agency; Evans on Principal and Agent.

him, and, within the limits of the particular business to which the agency or mandate extends, to bind his constituent." [1] He has been described by an English writer as " a person having express or implied authority to represent or act on behalf of another person, who is called his principal." [2]

483. Agency is distinguishable from mandate in respect that it is an onerous contract, whereas the latter is gratuitous.[3] Erskine speaks of a mandatary as " being in truth a trustee." [4] An agent is not now regarded as such. He may acquire property belonging to his principal,[5] and any which may be entrusted to his custody is not held on a proprietary title.[6] In an action by a principal for declarator that such property belongs to him, proof is not limited to writ or oath,[7] even in questions of heritage.[8] The position of an agent should also be contrasted with that of an independent contractor, who enjoys a greater measure of freedom as to his *modus operandi*, and for whose acts the employer is not ordinarily responsible.[9]

484. It is difficult to draw the line between agency and service; remuneration by commission is not conclusive. A servant has even less scope than an agent and very little ostensible authority (see MASTER AND SERVANT). The distinction between an agency and a branch of a foreign business is equally elusive. It is important in questions of JURISDICTION (*q.v.*), and trading with the enemy in time of war.[10]

485. A principal may perform through an agent any act which he can do himself, except where by contract or statute personal performance is obligatory. The acts of an agent, unless plainly beyond the scope of his authority, are binding on his principal, in accordance with the maxim *qui facit per aliam facit per se*. For example, a foreigner will be liable to British INCOME TAX (*q.v.*) in respect of profits earned by an agent in this country.[11] Further, as a general rule knowledge of the agent is knowledge of the principal. This is certainly the case as to risks of insurance,[12] and as to conditions in contracts of carriage.[13] But,

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[1] Bell's Dictionary, 31.
[2] Bowstead on Agency, 3.
[3] Bell's Commentaries, i. 506; Principles, 216.
[4] Ersk. iii. 3, 35.
[5] Gloag on Contract, 592; see also iii. 1 (*d*) *infra*.
[6] Menzies on Trustees, 6.
[7] *Forrester* v. *Robson's Trs*, 1875, 2 R. 755; *M'Connachie* v. *Geddes*, 1918 S.C. 391; see also *Burt* v. *Laing*, 1925 S.C. 181.
[8] *Corbett* v. *Douglas & Jarvie*, 1808; Hume, 346; *Horne* v. *Morrison*, 1877, 4 R. 977; cp. Bankton, i. 18, i. 5.
[9] *Smith* v. *General Motor Cab Co. Ltd.*, [1911] A.C. 188; *Foote* v. *Greenock Hospital Directors*, 1912 S.C. 69; *Bygraves* v. *Dicker*, [1923] 2 K.B. 585; *Performing Right Society* v. *Mitchell & Booker, Ltd.*, [1924] 1 K.B. 762; and see HIRING.
[10] See *In re Contrisho Caro & Co.*, [1918] 2 Ch. 390.
[11] Income Tax Act, 1842, s. 41; Finance Act (No. 2), 1915, s. 31; *Crookston Bros.* v. *S.R.*, 1911 S.C. 217; *Macpherson & Co.* v. *S.R.*, 1912 S.C. 1315; *Wilcock* v. *Pinto & Co.*, [1925] 1 K.B. 30.
[12] *Blackburn, Low & Co.* v. *Vigors*, 1887, 12 App. Cas. 531.
[13] *Lyons & Co.* v. *Caled. Rly. Co.*, 1909 S.C. 1185; *Grand Trunk Rly. Co. of Canada* v. *Robinson*, [1915] A.C. 740, at 747; *Lewis* v. *Laird Line, Ltd.*, 1925, S.L.T. 316, at p. 317.

on the other hand, adoption of a forgery cannot be established against the principal in respect of an agent's discovery and concealment.[1] In Scotland, notice to the law agent representing trustees is sufficient,[2] but in England this is not so unless he has authority to receive notices.[3] An unreasonable custom will not bind a principal who did not know of it.[4] Again, notice of withdrawal to an agent (to whom the offer was made), will not preclude the principal from acceptance before the notice is communicated to him.[5] The doctrine of constructive knowledge is thus subject to considerable limitations.

Subsection (2).—*Origin.*

486. The older authorities do not refer to agency in express terms, and their insistence upon the gratuitous nature of mandate would seem to relegate agency to *locatio operarum.*[6] It was, however, always "lawful to agree for a gratification or reward," which might also be presumed "from the special circumstances of the mandatary, or his way of life."[7] Agency may thus be regarded as a form of "improper mandate."[8]

Subsection (3).—*Classification of Agents.*

487. Agents may be either general or special. "An agent or factor for a merchant residing abroad is held . . . as his general agent," as is also "one who, acting as factor for a merchant, has been recognised by him in a train of dealings as his general representative. . . . Special agents are persons employed in a particular line."[9] Formerly a distinction was drawn on other lines between general and special mandates.[10] Later, the term "agent" was confined to a limited class (*i.e.* "those entrusted with the accomplishment of a particular act or course of dealing"), and the term "factor" applied to one whose authority "extended to the management of all his principal's affairs in the place where he resides, or in a particular department." But by modern practice the former has been made the genus, and the latter a species.[11] In England the terms are differently understood, and a special agent is one appointed for a particular transaction in a matter outwith the ordinary scope of his activities.[12] It should be noted, however, that later commentators in this country have adopted the English usage,[13]

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[1] *Muir's Exr.* v. *Craig's Trs.*, 1913 S.C. 349.
[2] *Browne* v. *Anderson*, 1901, 4 F. 305.
[3] *Saffron Walden* v. *Raynor*, 1880, 14 Ch. D. 406; Menzies, 225.
[4] *Perry* v. *Barnett*, 1885, 15 Q.B.D. 388; *Maffett* v. *Stewart*, 1887, 14 R. 506.
[5] *Raeburn & Verel* v. *Burness*, 1895, 1 C.C. 22.
[6] Digest, 17, 1, 1, 4; Stair, i. 12, 5; Bankton, i. 18, 1, 1; Ersk. iii. 3, 32; see Story, Agency, 4, and Bailments, chaps. iii. and vi.
[7] Bankton, i. 18, 1, 17; Ersk. *ib.*
[8] See Ersk. iii. 3, 37.
[9] Bell, Prin. 219, but see note (*e*).
[10] Stair, i. 12, 15.
[11] Bell, Com. i. 507.
[12] Bowstead, 4.
[13] Bell, Com. i. 510, n. 5; Bell, Dict. 850; Gloag on Contract, 193–94.

which seems to have received the sanction of the Court in *Morrison* v. *Statter*.[1] The distinction is material in questions of ostensible authority (*vide infra* Section 5, Subsection (1)), termination (*ib.*, Section 6 (1)), and income-tax.

The most important types of agents are factors, brokers, mercantile agents, and *del credere* agents.

Subsection (4).—*Capacity of Agent.*

488. A principal's capacity to act through an agent is in general co-extensive with his capacity to act alone. This, however, does not apply to cases of *negotiorum gestio*.[2] On the other hand, the part of an agent may competently be sustained by persons with limited or no capacity to contract or act on their own behalf, such as minors, and formerly married women, so long as heritable rights are not affected.[3] The acts of such agents will bind their principals, and their contracts on behalf of their principals will bind third parties, but the extent of their personal liability in agency transactions has not been fully developed by decision. It rather appears, however, that the personal liability of the agent is dependent upon his capacity to contract on his own behalf.[4] Lunatics cannot act as agents.[5] In the case of an *institor*, at any rate, a pupil may.[6]

Subsection (5).—*Joint Principals and Agents.*

489. There are various well-known cases of joint principals, of which partnership is the most familiar ; for each partner is the agent of all the other partners within the scope of the firm's business.[7] This is not necessarily true in other cases of joint ownership, although the managing owner of a ship is the agent of all the other owners.[8] The members of a committee who take part in its work are generally responsible for contracts made by the secretary, unless it should appear that the other contracting party relied exclusively upon the funds and did not give credit to the names.[9] The members of a club, however, are not regarded as joint principals of their committee. They are not liable, in the absence of any rule imposing such liability, to pay to the funds of the club, or to anyone else, any money beyond the subscriptions required by the rules of the club to be paid so long as they remain members.[10]

490. Where several principals appoint a common agent they are liable to him *singuli in solidum*.[11] The most common case of joint

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[1] 1885, 12 R. 1152, at p. 1154.
[2] *Quo vide Fernie* v. *Robertson*, 1871, 9 M. 437.
[3] See *in re D'Angibau*, 1880, 15 Ch. D. 228.
[4] *Smally* v. *Smally*, 1700, 1 Eq. Ab. 6.
[5] Evans, Principal and Agent, 2nd ed., 115.
[6] Stair, i. 12, 19.
[7] Partnership Act, 1890, s. 5; see Partnership.
[8] *Califatis* v. *Olivier*, 1919, 36 T.L.R. 18, 223.
[9] *Steele* v. *Gourley & Davis*, 1887, 3 T.L.R. 772, C.A.; *Overton* v. *Hewett*, 1887, 3 T.L.R. 246.
[10] *Wise* v. *Perpetual Trustee Co., Ltd.*, [1903] A.C. 139.
[11] Ersk. iii. 3, 35, 38; *Chalmers* v. *Ogilvie*, 1730 M. 14,706; *Walker*, 23rd Nov. 1803, F.C.; but see *Campbell* v. *Ayr County Council*, 1906, 14 S.L.T. 534.

agents, on the other hand, is that of the directors of a joint stock company. The general rule is that an authority given to a stated number of persons can be competently exercised only by all these persons, although where the joint agents have discretionary and deliberative powers, as in the case of a board of directors, they must necessarily act according to the vote of the majority.

Section 2.—Constitution.

Subsection (1).—*General.*

491. The question whether two persons stand at any time in the relation of principal and agent is always one of fact.[1] The relationship exists by virtue of the express or implied assent of both principal and agent, except in certain cases of necessity to be noticed later. There is no form to which the constitution of agency is limited. The relationship may be constituted by express appointment by the principal, by implication from the actings or situation of the parties, or by subsequent ratification by the principal of acts done on his behalf.

Subsection (2).—*Express Prior Assent.*

492. The necessary authority may be proved by writing, formal or informal, and for some purposes the authority conferred upon an agent either is required to be in writing or cannot conceivably be proved otherwise. In the case of appointments by corporations, whether municipal or trading, the formalities prescribed by law must be observed, but as a general rule parole proof is competent.[2] Powers of attorney and other formal documents conferring powers on agents are construed strictly and as giving only such authority as they confer expressly or by necessary implication.[3] General words do not confer general powers, but are limited to the purpose for which the authority is given, and are to be construed as enlarging the special powers only when necessary for the due fulfilment of these.[4] It is not competent, however, to prove by parole that a written mandate conferring general powers was in reality limited to a special purpose.[5]

Subsection (3).—*Implied Prior Assent.*

493. This may be (*a*) inferred from circumstances, or (*b*) implied by law from the situation of the parties. (*a*) In some cases, the mere possession of documents may raise a presumption of agency.[6] The

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[1] *MacKessack & Son* v. *Molleson*, 1886, 13 R. 445 ; *Maffett* v. *Stewart*, 1887, 14 R. 506 ; *Stewart, Brown & Co.* v. *Biggart & Fulton*, 1893, 21 R. 293.

[2] *Grant* v. *Fleming*, 1881, 9 R. 257 ; *Ross* v. *Cowie's Exr.*, 1888, 16 R. 224.

[3] *Goodall* v. *Bilsland*, 1909 S.C. 1152 ; *Park* v. *Mood*, 1919, 1 S.L.T. 170.

[4] *Bryant* v. *la Banque du Peuple*, [1893] A.C. 170.

[5] *Thomson* v. *Parochial Board of Inveresk*, 1871, 10 M. 178.

[6] Stair, i. 12, 12.

presence without protest of the principal, and the mere appearance of counsel in Court or of a servant at market are also sufficient.[1] But at the present day the cases in which a grant of authority is deduced from circumstances are to be found chiefly in the dealings of merchants and commission agents. Whenever one person by so acting as to make it appear that another has power to contract on his behalf has induced a third person to enter into a contract with that other, he will be liable on the ground of "holding out."[2] When one permits another to act for him in a certain course of business repeatedly, he is barred *personali exceptione* from denying a grant of authority in a question with a third party with whom the alleged agent has transacted within the scope of such business.[3] A practice on the part of the principal of recognising and homologating the acts of his agent in drawing bills *per procurationem* will imply power in the agent to do so.[4] Where a buyer paid for goods by cash to the sellers' agents without challenge and in good faith in a series of transactions and the agent embezzled the money, it was held, in an action for payment at the instance of the sellers, that the payments made to the agent were valid, in respect that no intimation had been made that he was not entitled to receive payments in that form.[5]

494. Authority is often given to an agent by the single act of the principal. If the owner of goods permits a person, whose ordinary course of business it is to sell that class of goods, to have possession of the goods or of the documents of title to the goods, and the goods are sold to a person who buys them in the belief that the holder has authority to sell, the owner is bound by the sale, whatever latent instructions he may have given.[6] In such a case it is immaterial whether the liability of the principal is referred to implied contract or to personal bar. There may be a "holding out" of authority beyond what the principal is legally capable of granting, as in the cases of *ultra vires* acts of directors of limited companies. In such cases the directors are personally liable.[7]

495. In Scotland a wife has a presumed mandate, while she remains in family with her husband, to provide things proper and necessary for the family, for the price of which the husband is liable, even when he has given the wife a sufficient allowance for such purposes. The husband may, of course, terminate his wife's authority to pledge his credit by inhibition or by private notice, which is equivalent to inhibition so far as the person warned is concerned.[8] A mere assignee in security does

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[1] Ersk. iii. 3, 33; *Lauder* v. *National Bank of Scotland*, 1918, 1 S.L.T. 43.

[2] *Spooner* v. *Browning*, [1898] 1 Q.B. 528; *Mortimer* v. *Hamilton*, 1868, 7 M. 158; *Thomas Hayman & Sons* v. *American Cotton Oil Co.*, 1907, 45 S.L.R. 207.

[3] *Barnetson* v. *Petersen Bros.*, 1902, 5 F. 86.

[4] *Swinburne & Co.* v. *Western Bank*, 1856, 18 D. 1025.

[5] *International Sponge Importers, Ltd.* v. *Watt & Sons*, 1911 S.C. (H.L.) 57; 1911, 1 S.L.T. 414.

[6] *Pickering* v. *Busk*, 1812, 15 East 38; *Henderson* v. *Williams*, [1895] 1 Q.B. 521.

[7] *Chapleo* v. *Brunswick Bdg. Society*, 1881, 6 Q.B.D. 696; *Firbank* v. *Humphreys*, 1886, 18 Q.B.D. 54; cp. *Elkington* v. *Hurter*, [1892] 2 Ch. 452.

[8] *Mortimer, supra*; *Paquin, Ltd.* v. *Beauclerk*, [1906] A.C. 148.

not become a principal and so liable for the debts of the business, lease, etc., assigned unless he has held himself out as such.[1]

Subsection (4).—*Necessity.*

496. Originally, only shipmasters were recognised as agents of necessity.[2] Later salvors and common carriers came to be included.[3] A shipmaster is entitled, when it is reasonably necessary and he cannot communicate with them, to make his owners and freighters liable in cases to which his powers as agent would not ordinarily extend.[4] A common carrier may also be made agent of necessity for the care of goods sent under his charge if, for example, there is no one to receive the goods at their destination.[5] In England, in certain circumstances, a wife may be an agent of necessity,[6] as also a vendor who is unable to deliver goods to his purchaser.[7] It is thought that the former case would not be so regarded in Scotland, while the position of the seller in the latter instance has been held to be that of trustee.[8] A *negotiorum gestor* (*vide infra*, Section 11) is in some respects an agent of necessity.

Subsection (5).—*Ratification.*

497. Where authority to act has not been given or created by any of the methods above described, a contract entered into without or in excess of authority may subsequently be ratified by the principal, so as to create rights and liabilities as at the date of the contract not only between the principal and agent, but also between the principal and the third party contracting. *Omnis ratihabitio retro trahitur et priore mandato æquiparatur.* Where ratification is not express it may be implied from the conduct of the principal in knowledge of the act,[9] or even from mere failure to repudiate.[10] Exceptions are allowed, however, where the principal has no option but to accept work already done,[11] and where the evidence of knowledge is ambiguous.[12]

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[1] *Eaglesham & Co.* v. *Grant*, 1875, 2 R. 960 ; *Newcastle Chem. Manure Co.* v. *Oliphant & Jamieson*, 1881, 9 R. 110 ; cp. *Macphail & Son* v. *M'Lean's Tr.*, 1887, 15 R. 47 ; and see *Fraser* v. *Mulloch*, 1876, 23 R. 619.

[2] Stair, i. 12, 18.

[3] *Gwilliam* v. *Twist*, [1895] 2 Q.B. 84, per Esher, M.R.

[4] "*The Sultan*," 1859, Swa. 504 ; "*The Gratitudine*," 3 Rob. Ad. 240 ; *The Atlantic Mutual Insurance Co.* v. *Hutt*, 1879, 16 Ch. D. 474 ; *Gemmill & Co.* v. *Somerville*, 1905, 12 S.L.T. 674.

[5] *G.N. Rly. Co.* v. *Swaffield*, 1874, 43 L.J. Ex. 89 ; *Sims* v. *Midland Rly. Co.*, [1913] 1 K.B. 103.

[6] *Durnford* v. *Parker*, [1924] 2 K.B. 587 ; see Wilshere on Agency, 30.

[7] *Prager* v. *Blatspiel*, [1924] 1 K.B. 566.

[8] *Stevenson* v. *Wilson*, 1907 S.C. 445.

[9] *Brown* v. *Dickson*, 1711, M. 6018 ; *Pierson* v. *Balfour*, 1st Dec. 1812, F.C.

[10] *Lombe* v. *Scott*, 1779, M. 5627 ; *Ballantine* v. *Stevenson*, 1881, 8 R. 959 ; cp. *Dowling* v. *Henderson*, 1890, 17 R. 921.

[11] *Forman* v. "*The Liddesdale*," [1900] A.C. 190.

[12] *Ross, Skolfield & Co.* v. *State Line Co.*, 1875, 3 R. 134.

498. Every act which is capable of being done by means of an agent, except possibly an act which is in its inception void, is capable of ratification by the person in whose name or on whose behalf it is done.[1] The effect of ratification is to invest the person who did the act, the person who ratified it, and third parties with the same rights and liabilities as if the act had originally been done with the authority of the person on whose behalf it was done,[2] subject to the exception that third party rights acquired before ratification cannot be prejudicially affected by the ratification.[3]

499. The power of ratification, however, is subject to conditions :

(*a*) There must be a principal actually in existence at the date of the contract.[4] If the promoters of a prospective company enter into a contract on behalf of the company before its incorporation, the company cannot, when formed, ratify the contract,[5] though it may subsequently enter into a new contract on the same terms, provided it is not *ultra vires*.[6]

(*b*) The contract must have been made as on behalf of the principal who seeks to ratify it.[7] If this were not so, the ratification would amount not to homologation of, but to an assignation of the rights and liabilities under, the contract. It is sufficient, however, if there is a principal capable of being ascertained and in contemplation at the date of the contract.[8]

(*c*) The act sought to be ratified must have been done by the agent as such and not on his own behalf as a principal.[9]

(*d*) The act of ratification must be at a time and under circumstances which would have permitted the original act. If, for example, it is essential to the validity of an act that it should be done within a certain time, ratification cannot take place after the expiry of that time to the prejudice of any third person.[10] Notice to determine a lease at a certain period so as to avoid tacit relocation, notice of dishonour of a bill so as to avoid discharge of an indorser's liability, a demand for payment so as to justify action, are examples of cases in which time is of the essence

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[1] *Spackman* v. *Evans*, 1868, L.R. 3 (H.L.) 171, 244 ; *Brook* v. *Hook*, 1871, L.R. 6 Ex. 89 ; see also *M'Kenzie* v. *British Linen Co.*, 1881, 8 R. (H.L.) 8 ; Bills of Exchange Act, 1882, s. 24.

[2] *Barnetson* v. *Petersen Bros.*, 1902, 5 F. 86.

[3] On the general principles of the constitution of agency and of ratification, see Bell's Com. i. 510, n. 5.

[4] *Tinnevelley Sugar Co., Ltd.* v. *Mirrlees, Watson & Yaryan Co., Ltd.*, 1894, 21 R. 1009.

[5] *Kelner* v. *Baxter*, 1886, L.R. 2 C.P. 174.

[6] *Howard* v. *Patent Ivory Co.*, 1888, 38 Ch. D. 156 ; *Shrewsbury* v. *N. Staffs. Rly. Co.*, 1866, L.R. 1 Eq. 593.

[7] *Boston Fruit Co.* v. *British Insurance Co.*, [1906] A.C. 336 ; *Keighley* v. *Durant*, [1901] A.C. 240 ; *Jones* v. *Hope*, 1880, 3 T.L.R. 247, n. (C.A.)

[8] *Watson* v. *Swann*, 1862, 31 L.J.C.P. 210 ; *Lyell* v. *Kennedy*, 1889, 14 App. Cas. 437 ; *Boston Fruit Co., supra.*

[9] *Keighley, supra.*

[10] *Bird* v. *Brown*, 1850, 4 Ex. 786 (Stoppage *in transitu*) ; *Dibbins* v. *Dibbins*, [1896], 2 Ch. 348 (Option) ; *Goodall* v. *Bilsland*, 1909 S.C. 1152 (Appeal) ; *Grover, Ltd.* v. *Mathews*, [1910] 2 K.B. 401 (Fire Insurance).

of the proceeding. On the other hand, provided the principal could at the time have done the act himself, and no rights of third parties are injuriously affected by the ratification, it may be done at any time. Thus the effecting of a policy of marine insurance by an agent may be ratified by the principal after a loss and in the knowledge thereof.[1] A question which still remains open is whether, where an offer is made to an agent and accepted by him without authority, and the offerer gives notice to the principal of the withdrawal of the offer, the principal can still, by ratifying the agent's act, make the contract binding on the offerer. It has been held in England that as the ratification dated back to the time of the acceptance the withdrawal was inoperative.[2] These decisions are, however, open to reconsideration.[3]

(*e*) An act which is *ultra vires* of the principal can never become binding on anybody by ratification,[4] but where the act is only *ultra vires* of the directors, and within the powers and objects of the company, it may be ratified by the company.

(*f*) Ratification must proceed upon a full knowledge of the material facts, unless the person ratifying waives further inquiry and ratifies the act and takes the risk whatever the circumstances may have been.[5] Further, the ratification must be complete, embracing the whole transaction, and where it is not express it must necessarily imply the homologation of the agent's act.

Section 3.—Relations between Principal and Agent.

Subsection (1).—*Duties of Agent.*

500. The agent's first duty is to carry out the instructions, express or implied, which he has received from his principal.[6] Where they are express they must be followed to the letter.[7] It is no defence that the agent acted without negligence and in the *bona fide* belief that he was acting in the best interests of his clients.[8] If, however, the authority is conferred in such ambiguous terms, or the instructions given are so uncertain, as to be fairly capable of more than one construction, then the agent, if he honestly acts in a manner which is warranted by any one of these constructions, is deemed to have been duly authorised, and is not liable to the principal in damages because the latter intended another construction.[9] In the absence of express instructions

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[1] *Williams* v. *North China Assurance Co.*, 1876, 1 C.P.D. 757 ; Marine Insurance Act, 1906, s. 86 ; cp. *Grover, Ltd., supra.*

[2] *In re Portuguese Copper Mines, ex parte Badman ; ex parte Bosanquet*, 1890, 45 Ch. D. 16 ; see also *Bolton Partners* v. *Lambert*, 1888, 41 Ch. D. 295 ; and *In re Tiedemann*, [1899] 2 Q.B. 66.

[3] *Fleming* v. *Bank of New Zealand*, [1900] A.C. 577.

[4] *Ashbury Rly. Carr. etc. Co.* v. *Riche*, 1875, L.R. 7 (H.L.) 653.

[5] *Spackman, supra*, and cp. *Haselar* v. *Lemoyne*, 1858, 28 L.J.C.P. 103.

[6] Ersk. iii. 3, 35.

[7] *Bank of Scotland* v. *Dominion Bank*, 1891, 18 R. (H.L.) 21.

[8] Ersk. ii. ; "*The Hermione*," [1922] P. 162.

[9] *Ireland* v. *Livingston*, 1872, L.R. 5 (H.L.) 395 ; *Myles* v. *Haslehurst*, 1906, 12 Com. Cas. 83.

the agent must act in accordance with the usage of trade applicable to the matter, or, if there has been a course of dealing between the parties, in accordance with the custom which has prevailed formerly. The construction of commercial commissions is dependent on the usage of trade.[1] Only necessity will excuse non-compliance with express or implied instructions. In the absence of instructions and of special usage the agent must, matters being left to his discretion, act to the best of his judgment for the benefit of his employer. He may contract in his own name if he wishes to do so.[2]

501. An agent appointed for a special purpose in a contract between his principal and a third party has no authority after accepting the agency to alter the contract.[3] An agent whose duty is to collect money cannot, without authority or a usage of trade sanctioning it, compromise a debt or give delay or a rebate to the debtor, or take bills in his own name. If he does so he will be liable to make good the amount of the debts to his principal.[4] It is otherwise, of course, if usage of trade sanctions it.[5] It is the agent's duty to accept payment only in cash, unless there is a usage to the contrary, but if the agent takes a cheque from a person having a banking account, that is not a departure from his authority.[6] Payment by cheque of the debtor is equivalent to payment in cash.[7]

502. In accounting or paying money the agent must follow the directions given by his principal. If he does not do so, but remits the money in some other fashion, he takes the risk of the remittance.[8] If no directions are given the agent must, if he does not remit through a chartered bank, remit through a banker who is at the time reputed to be in good credit, or he may follow the recognised custom or usage of the trade.[9] If an agent in the course of his agency puts his own name, without qualification, to a bill of exchange, either as drawer or indorser, of which the principal comes to be the holder, he is liable under the bill unless it is shown that both parties intended that he should not be liable.[10] An agent who fails to observe any of these rules renders himself liable in damages to his principal.[11] He can never be compelled, however, to execute a mandate involving dishonesty, immorality, or illegality.[12]

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[1] Bell, Com. i. 517.

[2] Stair, i. 12, 16.

[3] *Lindsay & Son* v. *Scholefield*, 1897, 24 R. 530; see also *Ord* v. *Gemmell & Son*, 1898, 1 F. 17.

[4] *Douglas* v. *Dalrymple's Trs.*, 1797, 4 Pat. App. 4; *Cameron*, 1871, 8 S.L.R. 322; *Broadhead* v. *Yule*, 1871, 9 M. 921.

[5] *Anderson* v. *Buck*, 1841, 3 D. 975.

[6] *Papé* v. *Westercott*, [1894] 1 Q.B. 272, at p. 278.

[7] *Carter* v. *Johnstone*, 1886, 13 R. 698; *Glasgow Pavilion, Ltd.* v. *Motherwell*, 1903, 6 F. 116; *Leggat Bros.* v. *Gray*, 1908 S.C. 67, at pp. 73 *et seq.*

[8] *Warwicke* v. *Noakes*, 1790, 3 R.R. 653.

[9] *Baines* v. *Turnbull*, 1795, M. 1486.

[10] *Le Feuvre* v. *Lloyd*, 1814, 1 Marsh. 318; *Webster* v. *M'Calman*, 1848, 10 D. 1133; *N.B. Bank* v. *Ayrshire Iron Co.*, 1853, 15 D. 782.

[11] *Vide infra*, para. 511.

[12] Ersk. iii. 3, 33.

503. The standard of care required of an agent is such care and diligence as would be shown by a man of ordinary prudence in the line of employment.[1] A person who received a horse for the purpose of training it was held liable for damages, he having trained the horse in proximity to a place where blasting operations were being carried on, with the result that the horse, having been startled by an explosion, ran off and was injured.[2] An agent who receives goods from his principal for sale has a duty to notify at once if they are of inferior quality and will not fetch the market price.[3] If an agent fails to inform his principal of a material circumstance which would influence the principal's mind in the conduct of the transaction, he will be liable for the ensuing loss.[4] When an agency is undertaken requiring special skill for its performance, the agent *spondet peritiam artis*, but does not guarantee absolute immunity from risk of failure. The skill required is the ordinary skill of persons in the particular profession or trade. Thus a law agent is bound to be conversant with the limitation of time imposed by sec. 1 (*a*) of the Public Authorities Protection Act, 1893,[5] but not with English decisions, though in revenue cases.[6] The standard required of a gratuitous agent in England is lower than in the case where remuneration is given, but this is not the law in Scotland.[7] It has been held that a mandatary of the former class will be excused if he proves that the loss was due to theft,[8] or shipwreck,[9] but the onus is always upon the agent to prove that it was so caused.[10] As to a *negotiorum gestor*, *vide infra*.

504. An agent is also bound to keep accounts,[11] and to account punctually. The ordinary commission agent is not a trustee, and is not bound to keep a separate bank account. If the agent is unable to explain a deficiency, the principal is entitled to have the loss made good without any suggestion of dishonesty.[12] As to details of accounting, see the cases undernoted.[13] It is the duty of an agent to inform his principal of the names of customers to whom he sells his principal's goods, failing which he may be held personally liable for the price.[14]

505. An agent must make no incidental profits; he must give his principal the full benefit of the contracts he makes on his behalf.[15]

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[1] Bell, Prin. s. 221; see *Hastie* v. *Campbell*, 1857, 19 D. 557.
[2] *Laing* v. *Darling*, 1850, 12 D. 1279. [3] *Simpson* v. *Duncan*, 1849, 11 D. 1097.
[4] *Wernham* v. *M'Lean, Baird & Wilson*, 1925 S.C. 407.
[5] *Simpson* v. *Kidstons & Co.*, 1913, 1 S.L.T. 74.
[6] *Free Church of Scotland* v. *M'Knight's Trs.*, 1916 S.C. 349; see also *Fletcher* v. *Gubb*, [1920] 1 K.B. 275.
[7] *Copland* v. *Brogan*, 1916 S.C. 277; but see Bell, Com. i. 516.
[8] *Grierson* v. *Muir*, 1802, Hume, Dec. 329.
[9] *Anderson*, 1583, M. 10082. [10] *Copland, supra.*
[11] *Simpson, supra.* [12] *Tyler* v. *Logan*, 1904, 7 F. 123.
[13] *Robb* v. *Gowans*, 1884, 11 R. 881; *Struthers* v. *Smith*, 1913 S.C. 1116.
[14] *Brydon* v. *Muir*, 1869, 7 M. 536.
[15] *Neilson* v. *Skinner & Co.*, 1890, 17 R. 1243, at p. 1251; *Grant* v. *Gold Exploration Syndicate*, [1900] 1 Q.B. 233; *Powell* v. *Jones*, [1905] 1 K.B. 11; see also Gloag on Contract, 589–93; Story on Agency, s. 211.

Custom of the trade is no defence to an infringement of this rule.[1] For example, an agent may not retain any commission [2] or discount [3] which he receives from a third party. If a broker is instructed to buy shares at a certain price and actually obtains them for less, he must account for his profit,[4] and it is his duty to endeavour to buy as cheaply as possible.[5] An agent may not sell his own goods to his principal,[6] much less is he entitled to buy in property with a view to resale to the principal.[7] There seems to be no reason why he should not purchase the principal's goods, provided he discloses all the material facts,[8] but he may not do so in order to accept on his own behalf a higher offer by a third party.[9] These are really examples of the rule that an agent is not permitted to enter into any transaction in which his interests will conflict with his duty towards his principal, unless, of course, the latter, having been made aware of all the material circumstances and of the extent of the agent's interest, consents.[10] They illustrate the extent to which an agent is a trustee for his principal.

506. Where, however, the principal is in full knowledge of the facts, additional remuneration may be retained by the agent in certain cases : (i) where he carries on two independent businesses ; [11] or even (ii) where he acts for two clients (whose interests do not conflict) in one business ; [12] (iii) where he receives no remuneration direct from his principal ; [13] and (iv) special cases such as *Neilson, supra.*[14] It is, of course, necessary for the principal, in order to make good his claim, to show that the agent was acting as such and on his behalf in that particular transaction.[15]

507. It is an implied term of the contract of agency that the agent will *not*, except with the consent of his principal, make use, to his principal's detriment, of any information or materials which he has acquired in the course of his duties.[16]

508. Strictly speaking, a principal has the right to expect personal performance on the part of his agent in accordance with the maxim *delegatus non potest delegare.* An agent is assumed to be appointed

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[1] *Ronaldson* v. *Drummond & Reid*, 1881, 8 R. 956.
[2] Bell, Com. i. 533 ; *Pender* v. *Henderson & Co.*, 1864, 2 M. 1429.
[3] *Robertson* v. *Dennistoun*, 1865, 3 M. 829.
[4] *Thompson* v. *Meade*, 1891, 7 T.L.R. 698 ; *Stubbs* v. *Slater*, [1910] 1 Ch. 632.
[5] *Ireland* v. *Livingstone*, 1872, L.R. 5 (H.L.) 395, at p. 407.
[6] *Bentley* v. *Craven*, 1853, 18 Beav. 75.
[7] *G.N. of Sc. Rly. Co.* v. *Urquhart*, 1884, 21 S.L.R. 377.
[8] See Gloag, 592.
[9] *De Bussche* v. *Alt*, 1878, 8 Ch. D. 286.
[10] *Williamson* v. *Hine*, [1891] 1 Ch. 390 ; *Bartram & Sons* v. *Lloyd*, 1904, 20 T.L.R. 281, C.A. ; *In re Haslam*, [1902] 1 Ch. 765.
[11] *Sherrard* v. *Barron*, 1923, 2 I.R. 21.
[12] *Sleigh* v. *Sleigh's J.F.*, 1908 S.C. 1112 ; but see Gloag, 578 and 590.
[13] *G.W. Insurance Co.* v. *Cunliffe*, 1874, L.R. 9 Ch. 525 ; *Baring* v. *Stanton*, 1876, 3 Ch. D. 502.
[14] *Neilson* v. *Skinner & Co.*, 1890, 17 R. 1243.
[15] *Douglas* v. *Dalrymple's Trs.*, 1797, 4 Pat. App. 4.
[16] *Robb* v. *Green*, [1895] 2 Q.B. 315 ; *Liverpool Friendly Society* v. *Houston*, 1900, 3 F. 42 ; *Kirchner* v. *Gruban*, [1909] 1 Ch. 413 ; but see *Earl of Crawford* v. *Paton*, 1911 S.C. 1017.

propter delectum personæ. The only exception formerly admitted was "if the mandate be of a nature so common that there is no distinction or fitness of persons, as precepts of sasine." [1] But in modern practice, "the maxim, when analysed, merely imports that an agent cannot, without authority from his principal, devolve upon another obligations to the principal which he has himself undertaken to personally fulfil, and that, inasmuch as confidence in the particular person employed is at the root of the contract of agency, such authority cannot be implied as an ordinary incident in the contract." [2] An agent may delegate his authority if the principal, either expressly or impliedly, has authorised him to do so. Express authority requires no comment. Authority is implied when, for example, from the usage of trade, the nature of the particular business which is the subject of the agency, or the conduct of the parties to the original contract of agency, it may reasonably be presumed that the parties to the original contract of agency intended that there should be such authority vested in the agent.[2] The power will also be implied if the principal knew at the time of the agent's appointment that he intended to delegate his authority,[3] or where the authority conferred is of such a nature as to render the employment of a sub-agent necessary. But the old rule still applies and delegation is excluded wherever the principal may reasonably have been held to have relied on the personal skill or discretion of the agent selected by him.

In *Speight* v. *Gaunt* [4] the principles are explained in which in trust administration the trustee is entitled, according to the usual course of business, to devolve certain duties on solicitors, bankers, and others, and to rely upon their exercising ordinary professional skill.[5]

509. Where, by the articles of association, the directors of a company are vested with the power of allotting shares, they cannot, in the absence of express authorisation to do so, delegate their power to a committee.[6] There is also an important class of cases in which, where authority has been given partly in view of the public interest, it has been held incompetent to transfer or delegate the authority conferred.

510. The rules as to the employment of a sub-agent may be referred to the rule that a mandate includes power to make it effectual, but what constitutes the authority necessary to carry out the general powers is always a question of fact.[7] An architect has been held entitled to employ a surveyor to whom the principal is liable [8]; but a railway station agent has no authority on behalf of the railway company to engage the services of a doctor for a lengthened period for another

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[1] Stair, i. 12, 7; Ersk. iii. 3, 34.

[2] *De Bussche, supra.*

[3] *Quebec, etc., Rly. Co.* v. *Quinn*, 1858, 12 Moo. P.C.C. 232; *Dew* v. *Met. Rly. Co.*, 1885, 1 T.L.R. 358.

[4] 1883, 9 App. Cas. 1.

[5] See also *Shepherd* v. *Harris*, [1905] 2 Ch. 310; *Learoyd* v. *Whiteley*, 1887, 12 App. Cas., at p. 733; and *Buchanan* v. *Eaton*, 1911 S.C. (H.L.) 40.

[6] *Harris'* case, 1872, L.R. 7 Ch. 587.

[7] *Morrison* v. *Statter*, 1885, 12 R. 1152.

[8] Cp. *Knox & Robb* v. *Scottish Garden Sub. Co.*, 1913 S.C. 572.

servant of the company who had been injured.[1] When delegation proper takes place, privity of contract is established between the principal and the sub-agent, and the agent ceases to be liable to the principal *quoad* that part of the agency which has been delegated.[2] But where there has not been delegation, but only employment by the agent of a sub-agent to perform all or part of his duties, privity of contract is not established between the principal and the sub-agent.[3]

Subsection (2).—*Liabilities of Agent.*

511. An agent who fails either to act according to his instructions or to observe due care is liable in damages to his principal. He is bound to indemnify his principal against all loss which is due to his own breach of duty.[4] If, however, it is clear that the loss was inevitable, then the principal has suffered no damage and the agent is exonerated.[5] But the agent cannot escape liability merely by showing that the rights which have been lost to his principal were legally unenforceable.[6] In England the opposite rule prevails, and a principal has been held to suffer no loss by the voiding of a p.p.i. policy owing to negligence in failing to disclose a risk.[7]

512. The loss must be directly traceable to the agent's actings, but these need not be the proximate cause. Where, however, the real cause is failure on the part of the principal to minimise the damage resulting, as is his duty according to general principles of law, he will not be entitled to recover from the agent. Where the latter neglects his instructions the former cannot refuse to implement the contract entered into, but must perform it, and then claim the actual loss from the agent.[8] The measure of damages, as a rule, will be (1) outlays and (2) loss of profits.[9] In one case, however, where a broker negligently reported that a contract had been fixed, when in fact it had not, and the other party subsequently resiled, the House of Lords refused to award anything under the second head.[10]

513. In general, an agent is not liable to his principal in respect of contracts concluded on the latter's behalf. There are two exceptions to this rule—*del credere* agents and insurance brokers. A *del credere* agent is liable to his principal for the solvency of persons who purchase

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[1] *Montgomery* v. *N.B. Rly. Co.*, 1878, 5 R. 796; see also *J. M. & J. H. Robertson* v. *Beatson & Co.*, 1908 S.C. 921; 16 S.L.T. 157.

[2] *De Bussche, supra*; *Powell* v. *Evan Jones & Co.*, [1905] 1 K.B. 11; *Hampton* v. *Glamorgan County Council*, [1917] A.C. 13.

[3] *New Zealand and Australian Land Co.* v. *Watson*, 1881, 7 Q.B.D. 374.

[4] *Eastern Shipping Co.* v. *Quah Beng Kee*, [1924] A.C. 177.

[5] *Davidson* v. *Mackenzie*, 1856, 19 D. 226; *Stiven* v. *Watson*, 1874, 1 R. 412.

[6] *Turnbull & Co., Ltd.* v. *Cruickshank & Fairweather*, 1905, 7 F. 791.

[7] *Cheshire & Co.* v. *Vaughan Bros. & Co.*, [1920] 3 K.B. 240.

[8] *Barkley & Sons* v. *Simpson*, 1897, 24 R. 346.

[9] *Cheshire, supra.*

[10] *Salvesen* v. *Rederi Aktbt. Nordstn.*, 1905, 7 F. (H.L.), 101; see also *Johnston* v. *Braham & Campbell, Ltd.*, [1917] 1 K.B. 586.

from, or deal with, him in the concerns of his principal, but his liability is conditional on the third party's failure to pay or otherwise implement the contract.[1] Insurance brokers are agents for both parties—for the insured to effect the policy, for the underwriter as to the premiums. They are also principals to receive the premiums from the assured and pay them to the underwriter.

514. In addition to his civil liability, an agent is liable to criminal prosecution if he corruptly accepts or obtains, or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gift or consideration as an inducement or reward for doing or forbearing to do any act in relation to his principal's affairs or business. Similarly, the person who corruptly endeavours to induce the agent to do, or to forbear to do, any act in relation to his principal's business is liable to prosecution. Further, if an agent knowingly uses, with intent to deceive his principal, any receipt or account or other document in respect of which the principal is interested, and which contains any statement which is false or erroneous or defective in any material particular, and intended to mislead the principal, he is liable to prosecution.[2] It has been held in a prosecution under the Act that a police constable is the agent of the chief constable.[3]

Subsection (3).—*Duties of Principal.*

515. These are (*a*) remuneration, (*b*) reimbursement, and (*c*) indemnification.

516. (*a*) *Remuneration.*—In all mercantile agencies, and also whenever the agent makes such duties as he has undertaken to perform the trade or profession by which he earns his livelihood, remuneration is presumed to be due. The presumption may, however, be rebutted,[4] and this may be implied from circumstances.[5] A *negotiorum gestor* is not entitled to remuneration.[6] The rate of remuneration in the case of commission or brokerage is settled by stipulation or by usage. Where the rate of remuneration is settled by stipulation or contract, no other contract which is inconsistent with that agreement, whether founded upon custom or not, can be implied for the purpose of contradicting or modifying the terms of the agreement; but evidence of custom may be admitted for the purpose of explaining an ambiguity in the terms of the contract. Where a person is not a professional broker, but does brokers' work so as to entitle him to remuneration, his commission is a *quantum meruit* depending upon circumstances.[7] A claim for *quantum meruit* by a

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[1] *Morris* v. *Cleasby*, 1816, 4 M. & S. 566.
[2] 6 Edw. VII. c. 34, ss. 1 and 3. [3] *Graham* v. *Hart*, 1908 S.C. (J.) 26.
[4] *Campbell* v. *Campbell's Exrs.*, 1910, 47 S.L.R. 837.
[5] *Mackersy's Exrs.* v. *St. Giles Cathedral*, 1904, 12 S.L.T. 391.
[6] *Fernie* v. *Robertson*, 1871, 9 M. 437, and see *infra*.
[7] *Robb* v. *Kinnear's Trs.*, 1825, 4 S. 106; *Brown's Trs.*, 1830, 4 W. & S. 28; *Kennedy* v. *Glass*, 1890, 17 R. 1085.

professional broker may be excluded by the existence of a clause which is inoperative.[1] Commission is generally due only when the agent's duty has been completely fulfilled; and if fulfilment is prevented by some cause for which the principal is not responsible, no claim for commission emerges.[2] The terms of the contract determine when the reward is due. In some cases commission is earned if an agreement to sell is executed although it is never carried out.[3] On the other hand, it may not be due unless the purchase is completed.[4] The latter implication may be inferred from a printed condition that commission is "payable on the purchase price."[5]

517. In order to justify his claim the agent must show that he was to a material extent responsible for the conclusion of the contract. Although he was not the person who eventually carried it through, he may be entitled to commission[6] if he was responsible for introducing the parties. Even if the prospective buyer resiles but interests a fourth person, who eventually purchases, the claim may succeed.[7] But where the parties are already well acquainted and expressly repudiate the services of the broker, he will not be entitled either to commission or to a payment *quantum meruit*.[8] In competition with other agents the matter is more complicated. Commission is due to that one owing to whose efforts the contract is actually effected, although he may not be the first to introduce the parties.[9] These rules are so well established amongst shipbrokers as to be treated as a matter of law, but the existence of a similar custom amongst other kinds of brokers may be proved as a matter of fact. Questions sometimes arise as to whether a particular contract is an entirely independent and separate transaction or whether it is essentially a revival of a previous one. In the latter case commission will be due.[10]

518. As a general rule an agent is not entitled to commissions upon orders received by his principal after the termination of the agency, but the operation of the rule may be displaced by the terms of the contract.[11] Also he is debarred from suing for his commission when he has been in material breach of the contract. Anything which may be due to him will be calculated on the basis of *quantum lucratus* the principal, not *quantum meruit* the agent.[12]

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[1] *Houlder, Ltd.* v. *Manx Isles Steamship Co.*, [1923] 1 K.B. 110.
[2] *Taplin* v. *Barrett*, 1889, 6 T.L.R. 30.
[3] *Menzies, Bruce-Low & Thomson* v. *M'Lennan*, 1895, 22 R. 299.
[4] *Chapman* v. *Winson*, 1904, 20 T.L.R. 663 (C.A.).
[5] *Knight, Frank & Rutley* v. *Gordon*, 1923, 39 T.L.R. 399.
[6] *Walker, Donald & Co.* v. *Birrell, Stenhouse & Co.*, 1883, 11 R. 369; *Walker, Fraser & Steele* v. *Fraser*, 1910 S.C. 222; *Burchell* v. *Gowrie and Blockhouse Collieries, Ltd.*, [1910] A.C. 614.
[7] *Gibb* v. *Bennett*, 1906, 14 S.L.T. 64.
[8] *Van Laun & Co.* v. *Neilson, Reid & Co.*, 1904, 6 F. 644.
[9] *Jacobs & Co.* v. *M'Millan & Son, Ltd.*, 1894, 21 R. 623; *Moss* v. *Cunliffe & Dunlop*, 1875, 2 R. 657; *White* v. *Munro*, 1876, 3 R. 1011.
[10] *Baines & Tait* v. *Compagnie Gen. des Mines d'Asphalte*, 1879, 7 R. 132; cp. *Dawson Bros.* v. *Fisher & Sons*, 1900, 2 F. 941.
[11] *Wilson* v. *Harper*, [1908] 2 Ch. 370; *Levy* v. *Goldhill*, 1917, 33 T.L.R. 479.
[12] *Graham & Co.* v. *United Turkey Red Co., Ltd.*, 1922 S.C. 533.

519. (*b*) *Reimbursement.*—The agent is entitled to be reimbursed his discharges, so far as properly charged and incurred in the prosecution of his business, and accordingly he may set off his expenses against what comes into his hands on behalf of his principal. Interest may be charged on disbursements when that is in accordance with the custom of trade or the course of dealings between the parties.[1] It has been held that a law agent is not entitled to interest on his charges unless a judicial demand for payment has been made, or the account has been rendered and passed by the principal, or intimation has been given to him that interest is claimed.[2]

520. (*c*) *Indemnification.*—The principal must also take the burden of all liabilities and obligations which the agent has necessarily assumed in order to discharge his duties towards his constituent.[3] This rule holds good even where the liability would not have affected the principal had he acted himself.[4] It may, however, be excluded by special agreement or custom of the trade.[5] Where a principal instructed his agent to sell certain shares, but concealed a fact of material importance to the agent in doing so, in consequence of which the agent incurred an exceptional liability and expense, the principal was held bound to relieve him.[6] Whenever a principal, by refusing to implement a contract duly entered into by an agent on his behalf, renders the agent liable to a claim of damages, or when an agent in consequence thereof voluntarily undertakes to make good expenses caused thereby to the third party, the principal is bound to relieve him.[7] This right of relief, however, does not extend to loss incurred by robbery or shipwreck, unless the agent was exposed to these perils in some especial degree by the course of his duties.[8]

Subsection (4).—*Liabilities of Principal.*

521. These arise with regard to (*a*) retention, and (*b*) discharge. An agent is entitled to retain the goods belonging to his principal which have come into his hands until he is indemnified for, or reimbursed, his expenses in connection therewith. Although the agent holds the goods on behalf of his principal, he cannot be compelled to deliver them up unless and until the principal is ready to implement the duties owed on his part. Retention is distinguished as special or general. The former is the right founded in the price due for, or expense incurred in connection with, the particular subject retained, and operates as a security for

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[1] See *Somervell's Tr., infra, re* Law Agent.

[2] *Blair's Trs.* v. *Payne*, 1884, 12 R. 104; *Somervell's Tr.* v. *Edin. Life Assce. Co.*, 1911 S.C. 1069.

[3] *Ex parte Bishop*, 1880, 15 Ch. D. 400; see also *Erskine* v. *Sachs*, [1901] 2 K.B. 504.

[4] *Adams* v. *Morgan & Co.*, [1924] 1 K.B. 751, *re* Supertax.

[5] *Leo Dinesmann & Co.* v. *Mair & Co.*, 1912, 1 S.L.T. 217.

[6] *Mackenzie* v. *Blakeney*, 1879, 6 R. 1329.

[7] *Glassford* v. *Brown*, 1830, 9 S. 105; *M'Braire* v. *Hamilton*, 1826, 2 W. & S. 66; *Stevenson & Sons* v. *Duncan*, 1842, 5 D. 167; *Lacey* v. *Hill*, 1870, L.R. 18 Eq. 182; *Warlow* v. *Harrison*, 1858, 1 E. & E. 295, 309.

[8] Stair, i. 12, 10.

the fulfilment of the counterpart exigible by the person in possession unless there be a special agreement for payment at a future time. General retention may be sustained in some cases although the debt due to the person retaining does not arise from the nature of the obligation in which he is debtor.[1]

522. The right of retention is founded on possession of goods lawfully obtained, and not delivered to the holder for a special purpose or with express directions inconsistent with the right to retain. It may be established by special contract, by acceptance of advertised conditions, and by the usage of certain trades ; and, indeed, certain rights of general retention are parts of the general law.[2] A mercantile factor has a lien over the goods in his possession for a general balance due to him by his principal.[3] An agent into whose hands the principal gives writs, books, or documents for the purpose of carrying out the obligations devolved upon him is entitled to retain these until he is paid what is due to him for his services. This right, well known when it takes the form of a law agent's lien,[4] has been held to be of general application, and, in particular, it has been enforced in regard to books and documents delivered to accountants to enable them to collect accounts,[5] and to writs in the hands of a factor applicable to the estate of which he was in charge.[6] In another case, however, the Court refused to allow a right of retention of books, the property of the principal, after the agency had terminated, on the ground that the principal had a greater interest in the books and required them for carrying on the business.[7]

523. The lien of the agent is lost by his voluntarily parting with the possession of the goods.[8] Where, however, an agent insures his principal's goods through an insurance broker, he has a lien over the policy and policy moneys in the broker's possession, such possession being considered as held for the agent.[9] The lien may be lost by the agent entering into an agreement which is inconsistent with the continued existence of the lien,[10] or by so acting as to lead to the conclusion that he intends to abandon the lien.[11] The agent's right to retain is lost also by his agreeing to payment being made to the principal direct.[12]

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[1] *Stevenson, Lauder & Gilchrist* v. *Dawson*, 1896, 23 R. 496.

[2] *Anderson's Tr.* v. *Fleming*, 1871, 9 M. 718 ; *Strong* v. *Philips & Co.*, 1878, 5 R. 770 ; *Mitchell* v. *Heys & Sons*, 1894, 21 R. 600.

[3] *Sibbald* v. *Gibson & Clark*, 1852, 15 D. 217 ; *Gairdner* v. *Milne & Co.*, 1858, 20 D. 565 ; see FACTOR.

[4] *Menzies* v. *Murdoch*, 1844, 4 D. 257 ; *Drummond* v. *Muirhead & Guthrie Smith*, 1900, 2 F. 585 ; see also LAW AGENT.

[5] *Meikle & Wilson* v. *Pollard*, 1880, 8 R. 69.

[6] *Robertson* v. *Ross*, 1887, 15 R. 67.

[7] *Murray* v. *Bernard*, 1869, 6 S.L.R. 230.

[8] *Callum*, 1825, 1 W. & S. 399 ; *Levitt* v. *Cleasby*, 1823, 2 S. 163 ; *Miller & Paterson* v. *M'Nair*, 1852, 14 D. 955 ; *Hathesing* v. *Laing*, 1873, L.R. 17 Eq. 92.

[9] *Wilmot* v. *Wilson*, 1841, 3 D. 815 ; *Gairdner, supra.*

[10] *Forth* v. *Simpson*, 1849, 13 Q.B.D. 680.

[11] *Angus* v. *Maclachlan*, 1881, 23 Ch. D. 330 ; *In re Morris*, [1908] 1 K.B. 473 ; *In re Douglas, Norman & Co.*, [1898] 1 Ch. 199.

[12] *Miller, supra.*

Although an agent may retain moneys coming into his hands as such agent for what is due to him by his principal, he cannot, after his principal's bankruptcy, collect accounts due to his principal and claim a right of retention over such money.[1]

524. With regard to discharge, a commission agent is not entitled to any notice of dismissal.[2] On the other hand, an employee engaged on a continuing contract will be entitled to damages. Cases in which the termination is brought about by the principal ceasing to carry on business are dealt with under Section 6, (7) *infra*.

Section 4.—Relations between Agent and Third Parties.

525. The rights and liabilities of an agent and third parties with whom he contracts depend upon the intention of the parties, to be gathered from the terms of the particular contract entered into or from the surrounding circumstances.[3]

Subsection (1).—*Liability of Agent for Disclosed Principal.*

526. The general rule is that an agent who acts for a disclosed principal is not personally liable under the contract.[4] By a disclosed principal is meant one whose existence is or ought to be known or has been revealed, whether or not he has been named. A shipbroker who orders stores for a ship is an agent for a disclosed principal, as the owner is immediately ascertainable from the Register of Shipping.[5] Until recently it was doubtful whether an agent could escape liability unless his principal was named. Later practice has not followed Professor Bell's opinion,[6] and it is now settled that knowledge or disclosure of his existence is sufficient to discharge the agent.[7]

527. There are a number of exceptions to this rule. An agent may undertake personal liability, either by contracting as co-principal, or by an express clause in an agreement entered into as agent. The question of whether the agent was contracting as such is one which depends on the terms of the deed (if any), or in a verbal transaction on the facts and circumstances surrounding it. It has recently been held that an agent may be sued if he declines to name his principal.[8] The mere addition of words such as " agent " or " director " are not sufficient to exclude liability, as these may be merely descriptive.[9] In the case

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[1] *Dickson* v. *Nicholson*, 1855, 17 D. 1011.

[2] *Levy* v. *Goldhill*, 1917, 33 T.L.R. 479.

[3] Bell, Pr. 224 A.

[4] *King* v. *Shirra*, 1827, 5 S. 231 ; *Russel & Aitken* v. *M'Farlane*, 1837, 15 S. 989 ; *Millar* v. *Mitchell*, 1860, 22 D. 833 ; *Ellis* v. *Goulton*, [1893] 1 Q.B. 350 ; *Owen & Co.* v. *Crouk*, [1895] 1 Q.B. 265.

[5] *Armour* v. *Duff & Co.*, 1912 S.C. 120.

[6] Bell, Pr. 222 A.

[7] *Universal Steam Navigation Co.* v. *M'Kelvie & Co.*, [1923] A.C. 492 ; see also Gloag on Contract, 179.

[8] *Gibb & Cunningham* v. *Robertson*, 1925 S.L.T. 608.

[9] *Brown* v. *Sutherland*, 1875, 2 R. 615 ; *Hutcheson* v. *Eaton*, 1884, 13 Q.B.D. 861.

of bills of exchange, promissory notes, etc., very clear expression of representative capacity is necessary to free the agent.[1] It has been held in the House of Lords, reversing the decision of the Court of Session, that an agent contracting as such was not personally liable under a contract *in gremio* of which he did not appear as a party, but which he signed " for " his principal, in virtue of a provision that demurrage was payable by him.[2] An intermediary who is a *del credere* agent for a purchaser will, of course, be liable to him, but the mere description " *del credere* agent " is not sufficient to involve liability, as it does not specify for whom it is undertaken.[3] Custom of the trade may also operate so as to give third parties recourse against an agent, *e.g.* ship-masters,[4] law agents,[5] and in certain circumstances shipbrokers.[6]

528. The rule under discussion is subjected to a further and serious limitation by the rules of evidence. Where an agent signs a written document in his own name, it is incompetent for him to prove by parole evidence that it was not intended that he should be personally liable.[7] " Where a person signs a contract in his own name without qualification, he is *prima facie* to be deemed to be a person contracting personally, and in order to prevent this liability from attaching it must be apparent from other parts of the document that he did not intend to bind himself as principal." [8] In such a case it is competent for the agent to restrict his liability by an express term of the contract, *e.g.* a cesser clause in a charter party.[9]

529. There was formerly a presumption that an agent acting for a foreign principal was liable as principal. The Scots Courts were always reluctant to accept this presumption and rapidly discarded it.[10] The English Courts have now followed suit.[11] The foreign element, however, may still be considered in determining whether or not the agent pledged his own credit in addition.

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[1] Bills of Exchange Act, 1882, s. 26; Companies (Consolidation) Act, 1908, s. 63; *Webster* v. *M'Calman*, 1848, 10 D. 1133; *Chiene* v. *Western Bank of Scotland*, 1848, 10 D. 1523; *M'Meekin* v. *Easton*, 1889, 16 R. 363; *Brebner* v. *Henderson*, 1925 S.C. 643; see also Gloag on Contract, 176–77.

[2] *Stone & Rolfe, Ltd.* v. *Kimber Coal Co.*, 1925 S.C. 277; *rev.* H.L. 1926, S.L.T. 419. With regard to verbal contracts, see *Thomas Hayman & Sons* v. *American Cotton Oil Co.*, 1907, 45 S.L.R. 207, and on the whole subject *Universal Steam Navigation Co., supra.*

[3] *Nouvelles Huileries Anversoises* v. *Mann & Co.*, 1924, 40 T.L.R. 804.

[4] *Meier* v. *Kuchenmeister*, 1881, 8 R. 642.

[5] *M'Donald* v. *Meldrum*, 1839, 1 D. 677; *Neill & Co.* v. *Hopkirk*, 1850, 12 D. 618; *Fortune's Exrs.* v. *Smith*, 1864, 2 M. 1005.

[6] *Hutchinson* v. *Tatham*, 1873 L.R. 8 C.P. 482.

[7] *Stewart* v. *Shannessy*, 1900, 2 F. 1288; *Gibb, supra*; cp. *Bank of Scotland* v. *Rorie*, 1908, 16 S.L.T. 21.

[8] Smith's Leading Cases, at p. 368, adopted by Ld. Kinnear in *Stewart, supra*, at 1293; but see Gloag on Contract, 175, n. 4.

[9] *Oglesby* v. *Yglesias*, 1858, 27 L.J. (Q.B.) 856; see also Carver on Carriage by Sea, 7th ed., s. 128.

[10] *Albion Insur. Co.* v. *Mills*, 1828, 3 W. & S. 218; *Millar* v. *Mitchell*, 1860, 22 D. 833; *Bennett* v. *Inveresk Paper Co.*, 1891, 18 R. 975; but see *Girvin, Roper & Co.* v. *Monteith*, 1895, 23 R. 129.

[11] *Miller, Gibb & Co.* v. *Smith*, [1917] 2 K.B. 141; *H. O. Brandt & Co.* v. *Morris*, [1917] 2 K.B. 784.

530. If the agent is not liable on the contract, damages may be awarded against him for breach of warranty if, by acting without or outwith authority, he fails to bind his principal.[1] The ground of this liability has been elaborately discussed in a series of English cases.[2] The same principle applies in the cases of fraud, misrepresentation and mere mistake.[3] It is not confined to cases where the agent enters into a contract.[4] In England the law seems to be that an agent warrants his principal to be still in life and in his right mind,[5] and that the warranty is only excluded in exceptional circumstances.[6] In Scotland the question is one rather of circumstances and good faith on the agent's part.[7] The warranty is not implied where the other party is aware of the limitations of the agent's authority,[8] nor by the custom of certain trades in the case of telegraphic authority.[9] If the agent can show that no loss has resulted (*e.g.* that the principal could not in any event have fulfilled his obligations by reason of insolvency), no damages will be awarded.[10] There may be some doubt as to whether a servant warrants his authority.[11] The measure of damages is the loss sustained as the natural and probable result of the agent's failure.[12]

531. An agent is also liable to third parties for his own negligence, misrepresentation, or fraud, whether his principal is bound or not, and whether the wrongful act was authorised by his principal or not.

Subsection (2).—*Liability for Undisclosed Principal.*

532. Where a person contracts as agent for an undisclosed principal, the other contracting party is entitled to look to him for performance.[13] The principal may at any time disclose himself, or the agent may at any time disclose the fact of his agency, whereupon the third party is entitled to elect which of them he intends to hold liable. The fact that the agent is personally bound does not affect the liability of the principal, nor does the fact that the other party relied upon the credit of the agent. The third party cannot be compelled to elect immediately, but when his election is made the other party is exempt from liability.[14]

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[1] *Morrison* v. *Stutter*, 1885, 12 R. 1152; *Anderson* v. *Croall*, 1903, 6 F. 153.

[2] *Collen* v. *Wright*, 1857, 8 E. & B. 647; *Dickson* v. *Reuter's Telegram Co.*, 1877, 3 C.P.D. 1; *West London Bank* v. *Kitson*, 1884, 13 Q.B.D. 360; *Starkey* v. *Bank of England*, [1903] A.C. 114; *Bank of England* v. *Cutler*, [1908] 2 K.B. 208.

[3] *Salton* v. *New Beeston Cycle Co.*, [1900] 1 Ch. 43; *Anderson, supra*; *Yonge* v. *Toynbee*, [1910] 1 K.B. 215.

[4] *Starkey, supra.*

[5] *Yonge, supra.*

[6] *Smout* v. *Ilberg*, 1842, 10 M. & W. 1.

[7] *Vide infra*, s. 6.

[8] *Halbot* v. *Lens*, [1901] 1 Ch. 344.

[9] *Lilly* v. *Smales*, [1892] 1 Q.B. 456.

[10] *Irving* v. *Burns*, 1915 S.C. 260.

[11] See Stair, i. 12, 16.

[12] *Firbank* v. *Humphreys*, 1886, 18 Q.B.D. 54; *Meek* v. *Wendt*, 1888, 21 Q.B.D. 126; *Starkey, supra*; *Anderson, supra.*

[13] *Thomson* v. *Davenport*, 1829, 9 B. & C. 78; 2 Smith's L.C. 355; *Cooke* v. *Wilson*, 1856, 1 C.B.N.S. 153; *Stewart, supra.*

[14] *Paterson* v. *Gandasequi*, 1812, 15 East 62; 2 Smith's L.C. 341; *Thomson, supra*; *Priestley* v. *Fernie*, 1865, 3 H. & C. 977; *Scarf* v. *Jardine*, 1882, L.R. 7 App. Cas. 345; *More* v. *Westmorland*, [1904] A.C. 11.

What constitutes election is a question of fact.[1] The option is generally retained at least until the third party discovers that there is a principal who is also liable,[2] but not where the agent has already been sued to final judgment.[3] An unsuccessful action against one will not preclude recourse against the other,[4] but obtaining final judgment has that effect.[5] If the third party delays to make his election and the state of accounts is altered between the principal and agent so that the former would be prejudiced by being bound to implement the contract, he cannot then be made liable by the third party.[6] Recourse against the principal is not barred by any private agreement between him and his agent that the agent will alone be liable, or by the principal having put his agent in funds to implement the contract.[7]

Subsection (3).—*Rights of Agent.*

533. *Contract.*—As a general rule, an agent acting for a disclosed principal, not being liable on the contract, has no title to sue in respect of it.[8] There are, however, several exceptions: (i) It may be expressly agreed that while the agent is under no liability he is yet entitled to enforce the contract.[9] In England it seems that this is not legal.[10] (ii) A broker in Scotland would have a *jus quæsitum tertio* to sue for his commission under a charter party. In England recourse has to be made to the doctrine of constructive trust,[11] but the result is the same. (iii) An agent who has a lien upon goods for monies due by his principal has a sufficient interest to sue, but in England, at any rate, a mere *del credere* agent has not.[12] (iv) If the other party chooses to sue the agent, the latter then has a right of reconvention on the contract.[13] (v) Where a principal has been wrongly named as such, the agent cannot adopt the contract and sue on it,[14] but if damages are claimed he can tender performance.[15] Where, however, the agent professed to act for a principal without naming him, he will be allowed to sue on the ground that it is not to be supposed that the other party was willing to contract with anyone except the agent.[16] Where the principal is as yet non-existent, *e.g.* an unformed company, it is thought that the

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[1] *Calder* v. *Dobell*, 1871, L.R. 6 C.P. 486; *Curtis* v. *Williamson*, 1874, L.R. 10 Q.B.D. 57; *Lamont, Nisbett & Co.* v. *Hamilton*, 1907, S.C. 628; 14 S.L.T. 825.

[2] *Thomson, supra*; *Chanter* v. *Borthwick*, 1848, 10 D. 1544.

[3] *Kendall* v. *Hamilton*, 1879, 4 App. Cas. 504.

[4] *Meier, supra.*

[5] See, however, *Black* v. *Girdwood*, 1885, 13 R. 243.

[6] *Armstrong* v. *Stokes*, 1872, L.R. 7 Q.B.D. 598; *Carsewell* v. *Scott & Stephenson*, 1839, 1 D. 1215; *Kymer* v. *Sawercropp*, 1807, 1 Camp. 109; *Smyth* v. *Anderson*, 1849, 7 C.B. 21.

[7] *Stewart* v. *Hall*, 1813, 2 Dow 29; *Williams & Co.* v. *Newlands*, 1861, 23 D. 1355.

[8] See *Fawkes* v. *Lamb*, 1862, 31 L.J. (Q.B.) 98, per Blackburn J.

[9] *Malcolm* v. *West Lothian Rly. Co.*, 1835, 13 S. 887; *Levy* v. *Thomson*, 1883, 10 R. 1134.

[10] *Elbinger Actien Gesellschaft* v. *Claye*, 1873 L.R. 8 Q.B. 313, at 317.

[11] *Les Affréteurs Réunis S.A.* v. *Walford*, [1919] A.C. 801.

[12] *Bramwell v. Spiller*, 1870, 21 L.T. 672.

[13] *Craig & Co.* v. *Blackatter*, 1923 S.C. 472.

[14] *Stewart, Brown & Co.* v. *Biggart, Fulton & Co.*, 1893, 21 R. 293.

[15] *Ibid.*, at 301.

[16] *Schmaltz* v. *Avery*, 1851, 16 Q.B. 655; *Harper* v. *Vigers*, [1909] 2 K.B. 549.

agent has no right to sue.[1] As the agent for an undisclosed principal is primarily liable, so he has the right to sue upon the contract.[2]

534. *Delict.*—In cases of slander an agent has a qualified privilege in respect of communications made to his principal.[3]

Section 5.—Relations between Principal and Third Parties.

535. The rights and liabilities of a principal in questions with third parties fall to be regulated according to (*a*) the knowledge of the parties, and (*b*) certain implications of law as to the extent of the agent's authority. They do not depend upon any private agreement between principal and agent.[4]

Subsection (1).—*Liabilities of Principal for Agent's Contracts.*

536. These are the same whether he is disclosed or undisclosed. The fact that he is a foreigner will not now excuse him.[5] His liability is not affected by that of the agent, where both can be made responsible, save in the case of election once duly exercised. Parole evidence is competent to render him liable on a contract in which he is undisclosed. The question of the liability of the principal through constructive knowledge derived from the agent has already been discussed.

537. The principal is always liable for the acts of his agent within the scope of his authority.[6] Where specific authority is alleged the onus is on the person alleging it to prove that it was actually conferred.[7] The authority of an agent may be express or implied. It varies with the general or special character of his employment, and in many cases is largely determined by trade custom or usage, as where a broker is entitled to act in accordance with the rules and customs of the Stock Exchange. Every agent has implied authority to do whatever is necessary for, or incidental to, the carrying out of his express authority in the usual way,[8] and to act according to the usage of the particular business in which he is employed.[9] Where contractors undertake to carry out work at the sight of some person appointed by the principal, and are paid for the work as certified by such person, the certificate of the surveyor is conclusive against the principal after the work is done and paid for, in the absence of fraud on the contractors' part.[10]

538. In cases of contract, where a written authority is known to exist, it is the duty of persons dealing with the agent to make themselves

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[1] Gloag on Contract, 203 ; but see Pollock, Contract, 115.

[2] On this part of the subject see Gloag on Contract, chap. viii.

[3] *Bayne* v. *Stubbs*, 1901, 3 F. 408 ; *Ingram* v. *Russell*, 1893, 20 R. 777.

[4] *Pickering* v. *Busk*, 1812, 15 East 38 ; Story, Agency, 133.

[5] *Vide supra*, para. 529.

[6] Bell, Com. i. 536.

[7] *Wylie & Lochhead* v. *Hornsby*, 1889, 16 R. 907 ; *Wood* v. *Clydesdale Bank*, 1914 S.C. 397.

[8] *Bank of Scotland* v. *Rorie*, 1908, 16 S.L.T. 21.

[9] *Scott* v. *Godfrey*, [1901] 2 K.B. 726 ; *Beckhusen* v. *Hamblett*, [1901] 2 K.B. 73.

[10] *Muldoon* v. *Pringle*, 1882, 9 R. 915 ; *Ayr Road Trs.* v. *Adams*, 1883, 11 R. 326.

aware of its terms ; and if the agent contracts otherwise than in accordance with them, or, in the case of an agent appointed for a definite period, after its termination, the principal will not be bound.[1] Where notice has been given to third parties of any restrictions on the agent they will be bound by them,[2] and in certain circumstances it is their duty to enquire.[3] Where no written authority and no actual limitations are known to exist, third parties may rely upon any act of the agent which is within his ostensible authority as implied in law.[4] It is immaterial that the agent was acting contrary to his express instructions and outwith his actual authority,[5] or that his intentions were fraudulent.[6] It is equally immaterial that the third party did not know of the existence of the principal and was not relying on his credit.[7]

539. In determining the limits of ostensible authority the distinction between general and special agents is of importance.[8] A typical example of ostensible authority is the case of the factor who, being entrusted with the possession and control of goods, or of the documents of title, has the right to sell these goods in his own name and receive payment of the price ; so that, even if the sale were made contrary to the owner's instructions, on the bankruptcy of the agent the purchaser is entitled to the goods sold so far as not delivered.[9] This rule holds although the agent acts not as agent but as principal.[10] Where a principal has allowed his agent to do certain acts, *e.g.* allowing a stockbroker to take certificates of stock in his own name, he is bound by what the agent does within the apparent scope of his authority, *e.g.* pledging these as securities for advances. But if an agent pledges the goods of his principal, and the pledgee has not been induced by the principal's actings to believe that the goods belonged to the agent, the rule applies that the pledgee takes them *tantum et tale* as they were in the hands of the agent, and after the advance has been repaid they cannot be retained in a question of settling accounts with the agent.[11] Various other examples have been collected by Mr. Gloag,[12] and may be found under particular forms of the contract of agency. Wherever an agent has at any time possessed actual authority for certain acts, the termination of that authority must be notified to third parties, or the continuance of such acts will be within the agent's ostensible authority.[13]

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[1] *North of Scotland Banking Co.* v. *Behn Moller & Co.*, 1881, 8 R. 423.

[2] *Paterson Bros.* v. *Gladstone*, 1891, 18 R. 403 ; *Walker* v. *Smith*, 1906, 8 F. 619 ; *Foreman* v. "*The Liddesdale*," [1900] A.C. 190 ; *Russo-Chinese Bank* v. *Li Yau Sam*, [1910] A.C. 174.

[3] *Paterson Bros., supra* ; *Hayman & Sons* v. *American Cotton Oil Co.*, 1907, 45 S.L.R. 207.

[4] *Paterson's Trs.* v. *Caled. Heritable Security Co.*, 1885, 13 R. 369.

[5] *Houldsworth* v. *City of Glasgow Bank*, 1880, 7 R. (H.L.) 53.

[6] *Hambro* v. *Burnand*, [1904] 2 K.B. 10 ; *Lloyd* v. *Grace Smith*, [1912] A.C. 716.

[7] *Thomson* v. *Davenport*, 1829, 9 B. & C. 78 ; *Armstrong* v. *Stokes*, 1872, L.R. 7 Q.B. 598 ; *Macphail & Son* v. *Maclean's Tr.*, 1887, 15 R. 47.

[8] *Morrison* v. *Statter*, 1885, 12 R. 1152 ; *Rand* v. *Craig*, [1919] 1 Ch. 1, per Neville J., at 6.

[9] See also Factors Acts, 1889 and 1890.

[10] *Edmunds* v. *Buschell*, 1865, L.R. 1 Q.B.D. 97 ; *Watteau* v. *Fenwick*, [1893] 1 Q.B. 346.

[11] *National Bank of Scotland* v. *Dickie's Tr.*, 1895, 22 R. 740.

[12] Contract, 194–95.

[13] *North of Scotland Banking Co., supra* ; *Mann* v. *Sinclair*, 1879, 6 R. 1078.

The Bills of Exchange Act, 1887, s. 23, has introduced a statutory exception to the above rule. Liability on bills of exchange and promissory notes is restricted to those persons who appear *in gremio* of the bill or note.

540. A principal is liable for the negligence or wrong of his agent in carrying out his contracts.[1]

SUBSECTION (2).—*Liability of Principal for Agent's Delicts.*

541. A principal is also liable for delicts committed by an agent in the course of his employment and within the scope of his authority.[2] The fact that he has expressly forbidden the act complained of is no defence.[3] On the other hand, he is not liable where the offence is plainly beyond the employment and authority.[4] In some circumstances, however, a mistake on the part of the agent in thinking that he has authority may involve his principal in liability.[5] The application of these rules is difficult. The fact that the principal has or has not benefited by the act of his agent is relevant.[6] The principal's liability extends even to cases of fraud,[7] as fraud is simply treated on the same basis as any other wrong.[8] It was considered at one time that the principal was not liable for fraud unless he benefited by it.[9] This has now been disapproved.[10] If the fraud occurs in the course of a transaction or act which is in itself within the scope, the mere fact that the principal was not *lucratus* will not absolve him. As a rule, however, absence of benefit will take the act outside the scope of the employment.[11] It is possible, in fact, that the rule of *Lloyd's* case [11] only applies to general agents.[12]

542. The following classes of acts, it would seem, are always beyond an agent's authority: (*a*) manifest crimes, such as signing an order contrary to the Truck Acts; [13] (*b*) forgery (unless there is some negligence on the part of the principal); [14] (*c*) purely malicious acts, such as assault,

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[1] *Citizen's Life Assurance Co.* v. *Brown*, [1904] A.C. 423; cp. *Glasgow Corporation* v. *Lorimer*, 1911 S.C. (H.L.) 35.

[2] *Harris* v. *N.B. Rly. Co.*, 1891, 18 R. 1009; *Dyer* v. *Munday*, [1895] 1 Q.B., at 478.

[3] *Limpus* v. *L.G.O. Co.*, 1862, 1 H. & C., 526.

[4] *Poulton* v. *L. & S.W. Rly. Co.*, 1867, L.R. 2 Q.B. 534; *Wardrope* v. *Hamilton*, 1876, 3 R. 876; *Hockey* v. *Clydesdale Bank, Ltd.*, 1898, 1 F. 119; *Beard* v. *L.G.O. Co.*, [1900] 2 Q.B. 530; *Sanderson* v. *Collins*, [1904] 1 K.B. 628; *Cheshire* v. *Bailey*, [1905] 1 K.B. 237.

[5] *Percy* v. *Glasgow Corporation*, 1922 S.C. (H.L.) 144.

[6] Glegg on Reparation, 289.

[7] *Barwick* v. *Eng. Joint Stock Bank*, 1867 L.R. 2 Ex. 259; *Gibbs* v. *British Linen Co.*, 1875, 4 R. 630; *Clydesdale Bank, Ltd.* v. *Paul*, 1877, 4 R. 626.

[8] *Houldsworth* v. *City of Glasgow Bank*, 1880, 7 R. (H.L.) 53, at 57.

[9] *Barwick, supra*; *Robb* v. *Gow Bros. & Gemmill*, 1905, 8 F. 90.

[10] *Lloyd* v. *Grace Smith & Co.*, [1912] A.C. 716.

[11] *Ward* v. *L.G.O. Co.*, 1873, 42 L.J. (C.P.) 265.

[12] *Rand* v. *Craig*, [1919] 1 Ch. 1, at 6.

[13] *Finlayson* v. *Braidbar Quarry Co.*, 1864, 2 M. 1297; but cp. *Osborne* v. *Gillett*, 1873, L.R. 3 Ex. 88.

[14] *Wallace's Trs.* v. *Port-Glasgow Harbour Trs.*, 1880, 7 R. 645, at 648; *Adair* v. *Connell*, 1894, 22 R. 116; *Bowie's Trs.* v. *Watson*, 1913 S.C. 326.

done to gratify a private spite.[1] Slander as a rule will not ground an action against the principal.[2] In one isolated case, statute has intervened to protect a principal from responsibility for his agents' delicts, viz. The Trades Disputes Act, 1906, s. 4, which applies irrespective of there being at the moment a trade dispute in progress.[3]

543. A contract induced by fraudulent misrepresentations of an agent is always reducible.[4] It would seem that a principal cannot altogether avoid liability by having inserted in the contracts made on his behalf an express provision that he will not be responsible for any statements made by his agent.[5]

544. In some cases a principal may be bound by acts of an agent which are outwith his ostensible authority. Actual authority and ratification are examples of this. If the principal is *lucratus* by fraud he may be sued on account on it.[6]

545. Where third parties are led by the conduct of the principal to believe that the agent is acting as a principal, or where the principal has remained undisclosed, they are entitled as against him to all rights, including the right of set-off, which they would otherwise have against the agent.[7] The third party is not bound to inquire whether the person with whom he deals is in reality a principal or an agent.[8] Set-off is competent in respect of a debt due by a factor when such factor sells goods of his constituent as his own and the buyer believes him to be the owner. It is the act of the principal in doing or permitting that which induces the erroneous belief on the part of the third party which makes the principal liable.[9] When the third party has, on the other hand, reason to believe that the person with whom he is dealing has only a limited title, he is put on his enquiry as to the facts, and he cannot, by abstaining from enquiry, acquire a higher right than he could have had if he had been aware of the extent of the agent's authority.[10] The rule illustrated by the cases may be summarised thus: in order that a person may set off a debt due to the principal against one due by his agent, it is necessary that the principal should have so acted as to induce, and should as a matter of fact have induced, him to believe that the agent was really a principal.[11]

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[1] *Ward, supra; Cameron* v. *Yeats*, 1899, 1 F. 456; see also *Eprile* v. *Caled. Rly. Co.*, 1898, 6 S.L.T., No. 87.

[2] *Eprile, supra; Finburgh* v. *Moss Empires*, 1908 S.C. 928; *Riddell* v. *Glasgow Corporation*, 1911 S.C. (H.L.) 35; *Mandleston* v. *N.B. Rly. Co.*, 1917 S.C. 442; *Jardine* v. *N.B. Rly. Co.*, 1923 S.L.T. 55. On this subject see Glegg, 286–292.

[3] *Vacher* v. *London Society of Compositors*, [1913] A.C. 107.

[4] *Stewart* v. *Kennedy*, 1890, 17 R. (H.L.) 25; *Mair* v. *Rio Grande Rubber Estates, Ltd.*, 1913 S.C. (H.L.) 74.

[5] *Laing* v. *Provincial Homes Investment Co., Ltd.*, 1908 S.C. 812.

[6] *Traill* v. *Smith's Trs.*, 1876, 3 R. 770, at 780; *Clydesdale Bank, supra*; *Hockey, supra*; cp. *Sinclair* v. *Wallace*, 1880, 7 R. 874; Glegg, 288.

[7] *Fish* v. *Kempton*, 1849, 7 C.B. 687; *Montagu* v. *Forwood*, [1893] 2 Q.B. 350.

[8] *Lavaggi* v. *Pirie*, 1872, 10 M. 312.

[9] *Smith* v. *Anderson*, 1847, 9 D. 702.

[10] *E. of Sheffield* v. *L.J.S. Bank*, 1888, L.R. 13 App. Cas. 333.

[11] *George* v. *Clagett*, 1797, 2 Smith's L.C. 130; *Cooke* v. *Eshelby*, 1887, 12 App. Cas. 271; *National Bank of Scotland* v. *Dickie's Tr.*, 1895, 22 R. 740; *Wester Moffat Colliery Co.* v. *Jeffrey*, 1911 S.C. 346.

546. As a rule the principal is not protected from an action at the instance of a third party by the fact that he has settled with the agent.[1]

Subsection (3).—*Rights of Principal.*

547. A principal's first right is that of enforcing contracts made on his behalf. Where he has been disclosed his right is unqualified unless he is expressly [2] or impliedly [3] excluded by the terms of the deed. Where he is undisclosed he may come forward and sue on the contract,[4] provided that there was no *delectus personæ* with regard to the agent,[5] and that his existence is not negatived by the terms of the deed. It has been held that the description of the agent as "owner" of a vessel excludes the principal,[6] but the word "charterer" is inconclusive.[7] There is, however, authority to the effect that a lender may always sue on a bond although taken in the name of his agent.[8] Parole evidence is competent to prove that a written contract was entered into on behalf of a particular principal.[9]

548. In the case of the bankruptcy of an agent, the principal has rights higher than those of an ordinary creditor. He is entitled to vindicate his property or money provided that it remains distinguishable in the agent's hands. Recent Scots cases refer chiefly to questions between clients and the trustee in bankruptcy of their law agents.[10] The rule does not seem to apply when the agent has bought goods in his own name, though with the principal's money.[11]

549. Third parties, as a rule, are bound to make payment to the principal and not to the agent. If goods of the principal are sold by an agent, the price is due to the principal, although undisclosed, and cannot be arrested in the hands of the purchaser by a creditor of the agent.[12] If the agent has been actually authorised to receive the money, or it is within his ostensible authority to do so, the payer will be protected.[13] But, *e.g.* a debtor who repays the capital sum in a bond to a law agent is held liable to the principal on the failure of the agent.[14] If, however, the agent has a lien on the price of goods he is entitled to

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[1] Gloag on Contract, 168–169.

[2] *Ransohoff & Wissler* v. *Birrell*, 1897, 25 R. 284.

[3] *Lamont, Nisbitt & Co.* v. *Hamilton*, 1907 S.C. 628.

[4] *Bennett* v. *Inveresk Paper Co.*, 1891, 18 R. 975.

[5] *Mabon* v. *Christie*, 1849, 6 D. 619; *Smith* v. *Wheatcroft*, 1878, 9 Ch. D. 223; *Galton* v. *Clydesdale Bank*, 1898, 1 F. 110; Gloag on Contract, 166.

[6] *Humble* v. *Hunter*, 1848, 12 Q.B. 310.

[7] *Drughorn* v. *Rederi A/B Transatlantique*, [1919] A.C. 203; cp. *Rederi A/B Argonaut* v. *Hani*, [1918] 2 K.B. 247.

[8] Ersk. iii. 3, 34; *Street* v. *Hume and Bruntfield*, 1669 M. 15122; *Alison* v. *Fairholms & Malcolm*, 1765 M. 15132.

[9] Bell, Com. i. 537; *Keighley* v. *Durant*, [1901] A.C. 240.

[10] See *Macadam* v. *Martin's Tr.*, 1872, 11 Macph. 33; *Jopp* v. *Johnston's Tr.*, 1904, 6 F. 1028. As to the meaning of "distinguishable," see Bell's Com. i. 287.

[11] Ersk. iii. 3, 34; *Boylston* v. *Robertson and Fleming*, 1672 M. 15125.

[12] *North-Western Bank* v. *Poynter*, 1894, 22 R. (H.L.) 1.

[13] *International Sponge Importers* v. *Watt*, 1911 S.C. (H.L.).

[14] *Peden* v. *Graham*, 1907, 15 S.L.T. 143; *Bowie's Trs.* v. *Watson*, 1912, 1 S.L.T. 99.

receive it.[1] Further, where an agent acts as a principal, or where the person with whom he is dealing is led, by the conduct of the principal, to believe that he is a principal, the third party is discharged from liability under the contract by payment to or settlement with the agent.[2]

550. In addition to incurring criminal liability a person who procures a contract by bribing an agent commits a civil wrong against the principal and is liable to him in damages.[3]

Section 6.—Termination.

551. The contract of agency may be brought to an end in the following ways :—

(1) Where the relationship is limited to a particular period or purpose, by expiry or performance respectively.[4]

(2) The death of either party ends the mandate as a rule, but there are exceptions. The law of England is in this matter different in many respects from Scots law.[5] In the case of the principal's decease the subsequent actings of an agent in *bona fide* ignorance of the fact are (in Scotland) good against the representatives of the constituent,[6] as also are payments to the agent.[7] In certain circumstances, in order to minimise loss it is the duty of the agent to continue in office for a reasonable period.[8] Further, the rule does not apply where "the nature of the mandate is such that it must be performed after the mandant's death."[9] The question whether the agent is liable to third parties is discussed above. In the event of the agent's death, his heir may sometimes be entitled to carry on his duties.[10]

(3) Revocation by the principal in general terminates the contract. Where there is no fixed term, notice may be given at any time,[11] unless the authority was coupled with an interest, when reasonable cause must be shown.[12] The older rule that, even where the agreement was for a definite period and was expressly declared to be irrevocable, it was always determinable at the will of the mandant, does not apply where the mandatory receives remuneration.[13] Mandates *in rem suam* of the mandatary, such as assignations of debts, are, of course, still absolute. A principal is not, however, entitled to revoke *dolore* in order to prejudice the agent, and, of course, an authority cannot be withdrawn after it

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[1] *Robinson* v. *Rutter*, 1855, 4 E. & B. 954 ; Bell, Com. i. 529 n.

[2] *National Bank of Scotland* v. *Dickie's Tr.*, 1895, 22 R. 740.

[3] *Salford Corporation* v. *Lever*, 1891, 1 Q.B. 168 ; *Grant* v. *Gold Exploration Syndicate*, [1900] 1 Q.B. 233. On this branch of the subject see Gloag on Contract, chap. viii.

[4] *Price & Co.* v. *Tennent*, 1844, 6 D. 659 ; *Black* v. *Cullen*, 1853, 15 D. 646.

[5] See Ld. M'Laren in Bell's Com. i. 526 n.

[6] Ersk. iii. 3, 40 ; *Campbell* v. *Anderson*, 1829, 3 W. & S. 384 ; but see *Kennedy* v. *Kennedy*, 1843, 6 D. 40 ; cp. *Blades* v. *Free*, 1829, 9 B. & Cr. 167.

[7] Bankton, i. 18, 1, 17.

[8] Ersk., *ibid.*

[9] Bankton, i. 18, 1, 17.

[10] Ersk. iii. 3, 41.

[11] *Walker* v. *Somerville*, 1837, 16 S. 217.

[12] *Galbraith & Moorhead* v. "*Arethusa*" *Ship Co., Ltd.*, 1896, 23 R. 1011.

[13] Stair, i. 12, 8 ; Bankton, i. 18, 1, 18.

has been executed. Compensation for bygones is always due unless *in re integra*.[1] In questions with third parties, notice must be given to put them in *mala fide* in continuing to deal with the agent.[2] Revocation may also be implied as well as express, as in general, though not necessarily, by the appointment of another agent with notice to the first,[3] and to third parties. Renunciation by the agent is governed by the same rules, *e.g.* not *re infecta* or *dolore*.

(4) Bankruptcy of either party brings the contract to an end, as it is always implied that " matters continue in the same state." [4]

(5) Insanity of the agent has the same effect, but insanity of the principal must be permanent,[5] and intimated to third parties,[6] or his estate will be liable. In any event, if the agent continues to act after his principal is insane he becomes a *negotiorum gestor*.[7]

(6) Impossibility of performance (even in a mercantile sense) destroys the agreement, unless it is an implied term that it is to continue.[8] The Courts have thus laid down that where remuneration is on a commission basis it is no longer due when it becomes impossible to carry on the business, but where there is a fixed salary the agent must be compensated.[9]

(7) If a foreign principal becomes an alien enemy owing to the outbreak of war, the contract is terminated.[10]

Section 7.—Brokers.

Subsection (1).—*Definition.*

552. The term " broker " has been imported into Scots Law from England largely owing to the influence of Mr. Bell.[11] The decisions and the custom which have defined a " broker's " legal position are almost entirely English. Lord M'Laren points out [12] that these authorities must be received with caution in this country. A broker is a limited agent who is employed in making bargains or contracts between other persons in matters of trade, commerce, and navigation. He is a mere negotiator and is not entrusted with the custody of the goods he buys or sells, whereby he is distinguished from a factor.[13]

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[1] Bankton, i. 18, 1, 18.
[2] *Ferguson & Lillie* v. *Stephen*, 1864, 2 M. 804.
[3] Ersk. iii. 3, 40 ; Bankton, *ibid.* ; *Patten* v. *Carruthers*, 1770, 2 Pat. App. 238.
[4] Bankton, *ibid.*
[5] *Wink* v. *Mortimer*, 1849, 11 D. 995.
[6] *Pollock* v. *Paterson*, 10th Dec. 1811, F.C.
[7] *Vide infra*, s. 11.
[8] *Rhodes* v. *Forwood*, 1876 L.R. 1 A.C. 256 ; *Turner* v. *Goldsmith*, 1891, 1 Q.B. 544 ; *In re English, etc., Insurance Co.*, 1870, L.R. 5 Ch. 737.
[9] *Patmore & Co.* v. *Cannon & Co.*, 1892, 19 R. 1004 ; *S.S.* " *State of California* " *Co., Ltd.* v. *Moore*, 1895, 22 R. 562.
[10] *Stevenson & Sons* v. *A.G. fur Carbonnagen Industrie*, [1918] A.C. 239 ; *Maxwell* v. *Grunhut*, 1914, 31 T.L.R., at 80.
[11] Com. i. 459-60, 507–508 ; Prin. 89, 219.
[12] Bell, Com. i. 460 n.
[13] Bell, Com. i. 506 ; *Baring* v. *Corrie*, 1818, 2 B. & A. 137 ; Bowstead on Agency, 4.

Consequently, the powers and functions of a broker are more limited than those of a factor. He is not entitled to contract in his own name or to receive payment; he has no right of lien, and third parties may not set off against the price a debt due by him. The term broker in its largest sense may be applied to anyone who acts as an intermediary in negotiation, or effects any kind of bargain: "all persons are brokers who contrive, make, and conclude bargains between merchants and tradesmen for which they have a fee or reward";[1] but here the word is used in its emphatic meaning of a broker for the sale or purchase of goods, the other classes of brokers being dealt with under other titles. See INSURANCE; SHIPBROKER; and STOCK EXCHANGE. As to bill brokers, see *Price & Co.* v. *Tennent*.[2]

SUBSECTION (2).—*Double Agency.*

553. In a certain sense a broker may be agent for both parties. Strictly speaking, he should represent only that principal who first employs him,[3] but when he is employed to buy or sell goods for one person, and he agrees with another for their sale or purchase, he is considered to be the agent of both.[4] But if a broker is given a discretion as to the terms of purchase or sale, it is evident that he cannot properly act for both parties, for it is impossible to reconcile the duties of buying cheap and selling dear.[5] "But there is nothing to prevent a broker being an agent for both parties on those points where their interests are the same. The broker who is trusted to sell at the best price he can get, must be the vendor's agent, and his only, in settling what the price is to be; but when that is agreed upon, he may well be agent for both buyer and seller in seeing that the terms of the contract are clearly understood and made binding in law."[6] Further, an insurance broker may and often does represent underwriter as well as assured.[7]

SUBSECTION (3).—*Bought and Sold Notes.*

554. The contracts effected by brokers are generally reduced to writing in the form of bought and sold notes. In England, where there is only one broker acting for both parties, it is the entry in his books that constitutes the contract, and discrepancies in the notes are ignored.[8] Agreement is thus reached by the mere *enixa voluntas* of the common agent. It is reduced to writing in order to comply with the provisions of the Statute of Frauds and of s. 4 of the Sale of Goods Act, 1893. In

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[1] *Milford* v. *Hughes*, 1846, 16 M. & W. 174.
[2] 1844, 6 D. 659.
[3] *Darrell* v. *Evans*, 1861, 6 H. & N. 660.
[4] Chitty on Contracts, 15th ed., 89.
[5] See, however, Ld. M'Laren's note in Bell, Com. i. 598.
[6] Blackburn, p. 78; *Thomson* v. *Gardiner*, 1876, 1 C.P.D. 777.
[7] *Shee* v. *Clarkson*, 1810, 12 East 507; *Empress Assurance Corporation* v. *Bowring*, 1906, 11 Com. Cas. 107; *Glasgow Assurance Corporation* v. *Symondson*, 1911, 104 L.T. 254.
[8] Bowstead, 315-16.

Scotland, supposing that "a broker had an absolute commission to buy for one man and an absolute commission to sell for another, either at discretion or at a given price, there seems no doubt that in strict principle a contract would be completed . . . by his *enixa voluntas* alone, without any writing on his part, and before any communication to his principals of the bargain." The inconvenience, however, is obvious. In the usual case with us, where "the broker has no direct power to buy or sell without reference to his principals, or one of them; where, in short, he is a mere *internuntius* proposing terms and conducting the negotiations, but with a power of dissent in the parties, the sending of a bought note to the one, and a sold note to the other, not *debito tempore* rejected by either, will complete the contract, as being evidence of *consensus ad idem* on the part of both principals." [1] Where one broker is employed by the seller and another by the buyer, as a rule the note passing between the agents constitutes a binding contract. This presumption may, however, be excluded by the intention of the parties as revealed in subsequent correspondence. Parole evidence of intention is incompetent.[2]

555. There are three forms of bought and sold note in general use, and the differences in them are of importance in considering questions of the broker's liability. The first and complete form begins: "Sold for A. B. to C. D.," or "bought for C. D. from A. B."; then follow the terms of the contract, and each note is signed by the broker "E. F., broker." The importance of this form of note lies in the names of the principals being disclosed, and the broker's character appearing from his signature. It follows that the broker can neither sue nor be sued on such a contract.[3] The second form of note begins: "Sold for A. B.," or "sold for A. B. to our principals," and is signed "E. F., broker." *Prima facie* the broker is not liable on such a contract; but it is competent to show that by usage of a particular trade he is liable.[4] The third form of note is this: "Sold to A. B. by me," and is signed by the broker without adding the word "broker." In this case the broker assumes the obligation of a principal, and cannot escape responsibility by parole proof that he was only acting as broker for another,[5] although the party to whom he gives such a note is at liberty to show that there was in reality an unnamed principal, and to make this principal responsible.[6] Another form of note may be mentioned, where the broker professes to sign as a broker, but is really the principal, as in *Robinson* v. *Mollett*.[7] In such a case his signature does not bind the other party, and he cannot sue on the contract. A

[1] Bell, Com. i. 460 (note by Ld. M'Laren).
[2] *Towill & Co.* v. *British Agricultural Assoc.*, 1875, 3 R. 117.
[3] *Fairlee* v. *Fenton*, 1870, 5 Exch. 169.
[4] *Humfrey* v *Dale*, 1858, 7 El. & Bl. 266; *Fleet* v. *Murton*, 1871, 7 Q.B. 126.
[5] *Müller & Co.* v. *Weber & Schaer*, 1901, 3 F. 401.
[6] Benjamin on Sale, 286; Bell, Com. i. 460; *Higgins* v. *Senior*, 1841, 8 M. & W. 834; *Calder* v. *Dobell*, 1871, 6 C.P. 486.
[7] 1874 L.R. 7 H.L. 802.

bought and sold note of the value of £100 requires a sixpenny stamp, and if under that value a penny stamp.[1]

Subsection (4).—*Authority and Powers.*

556. The implied authority and powers of a broker for sale are, generally speaking, those of other agents, with the modifications necessitated by the special nature of his employment, or established by usage. "The authority of a broker to bind his principal may by special agreement be carried to any extent that the principal may choose, but the customary authority of brokers is for the most part so well settled as to be no longer a question of fact dependent upon evidence of usage, but a constituent part of that part of the common law known as the law-merchant, or the custom of merchants."[2] And if the broker's authority be specially limited, the party dealing with him has still a right to consider all that is done by the broker, within the scope of his general authority, as binding on the principal, unless he has notice of the special limitations.[3]

557. A broker has implied authority to transact in accordance with the usages of the particular market or trade in which he may be employed, so long as these usages are not inconsistent with his employment as broker.[4] But the custom of trade must be such as merely controls the mode of performing the contract, and not such as in any way alters its intrinsic character. And therefore proof of usage could never warrant the conversion of a broker from an agent to buy for his employer, into a principal to sell to him;[5] nor in such a case is it material to show that the broker has charged or paid a fair price.[6] He will not be permitted, directly or indirectly, to buy from or sell to himself, even if his motive be honest and he does better for his principal than if he had bought or sold in the open market. But if the custom is of general observance and not unreasonable, the principal's ignorance of it does not prevent his being bound, for his liability does not depend on his knowledge of the customs of the market in which he is dealing, but on the implied authority of his broker to act according to these customs, whatever they may be, within the limits of reason.[7] As instances of the effect of usage may be mentioned the limitation of the broker's authority to the day on which it is given;[8] authority to sell in his

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[1] 54 & 55 Vict. c. 39.

[2] Benjamin on Sale, 5th ed., 285.

[3] Byles, J., in *Heyworth* v. *Knight*, 1864, 17 C.B. (N.S.) 298.

[4] *Harker* v. *Edwards*, 1887, 57 L.J. (Q.B.) 147, C.A.

[5] *Waddell* v. *Blockey*, 1878, 4 Q.B.D. 678; *Maffett* v. *Stewart*, 1887, 14 R. 506; and see *Stewart, Brown & Co.* v. *Biggart & Fulton*, 1893, 21 R. 293.

[6] *Rothschild* v. *Brookman*, 1831, 5 Bli. (N.S.) 165.

[7] *Grissell* v. *Bristowe*, 1868, L.R. 3 C.P. 112; *Maxted* v. *Paine*, 1871, L.R. 6 Ex. 132; *Nickalls* v. *Merry*, 1875 L.R. 7 H.L. 530; Bell, Prin. 225 *Anderson* v. *Buck & Holmes*, 1841, 3 D. 975; *Swinburne* v. *Western Bank*, 1856, 18 D. 1025; see Stock Exchange.

[8] *Dickinson* v. *Lilwall*, 1815, 4 Camp. 279.

own name with an indemnity from liability and a lien on the price, and a right of set-off against the buyer ; [1] and to sell with a warranty.[2]

558. Generally, and unless the rule is displaced by proof of custom,[3] a broker has no authority to sell in his own name, and if he does so his principal is not bound.[4] He may fix the price and the time and mode of payment, and may sell on reasonable credit, if no usage is proved to the contrary, except in the case of stock or shares ; [5] but in the latter case power is reserved to the principal to object within reasonable time to the credit of the buyer.[6] A broker has no implied authority to receive the price ; [7] and a purchaser who pays a broker, knowing him to be such, may still be sued for the price, unless he has been induced to pay the broker by the seller's own conduct.[8] But if the principal remains undisclosed when the time of payment arrives, the purchaser may pay the broker,[9] and generally in this connection the principal may be bound by custom of trade, or if the course of dealing between the parties warrants it.[10]

559. A broker has no implied power of delegation. He is presumably employed from belief in his personal skill, and he has no right, without notice, to turn his principal over to another of whom he knows nothing.[11] And if the sale is carried through by a sub-agent, the principal may recover the goods or their value.[12] A broker has no power to cancel a contract concluded by him,[13] or to vary its terms without fresh authority from his principal.[14]

Subsection (5).—*Duties and Liabilities to Principal.*

560. The duties and liabilities of a broker to his principal are generally those of other agents. He must exercise his best discretion, skill, and diligence, and carefully obey any instructions as to amount, time, place, and price. So where A. employed B. to buy goods of the best quality, and B. delegated his employment to C., who bought an inferior quality, A. recovered damages from B. for breach of duty, and B. was entitled to recover from C. the full amount of the damages and costs incurred by him in the action by A.[15] The broker must inform the principal of all material communings between the other party and himself.[16] All profits

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[1] *Cropper* v. *Cook*, 1868 L.R. 3 C.P. 194.
[2] Leake on Contracts, 5th ed., 353.
[3] *Mackenzie & Aitken* v. *Robertson*, 1886, 13 R. 494.
[4] *Baring* v. *Corrie*, 1818, 2 Barn. & Ald. 137.
[5] *Boorman* v. *Brown*, 1842, 3 Q.B. 511 ; *Wiltshire* v. *Sims*, 1808, 1 Camp. 257.
[6] *Hodgson* v. *Davies*, 1810, 2 Camp. 530. [7] *Baring, supra.*
[8] *Irvine* v. *Watson*, 1880, 5 Q.B.D. 414.
[9] *Campbell* v. *Hassel*, 1816, 1 Stark. 233, and *Morris*, there cited ; Campbell on Commercial Agency, 2nd ed., 559.
[10] *Baring, supra.* [11] *Cockran* v. *Irlam*, 1813, 2 M. & S. 301.
[12] *Henderson* v. *Barnewell*, 1827, 1 Y. & J. 387 ; *Cockran, supra.*
[13] *Xenos* v. *Wickham*, 1866 L.R. 2 H.L. 296.
[14] *Blackburn* v. *Scholes*, 1810, 2 Camp. 343.
[15] *Mainwaring* v. *Brandon*, 1818, 2 Moore 125.
[16] *Wright* v. *Baird*, 1868, 6 S.L.R. 95 ; *Johnson* v. *Kearley*, [1908] 2 K.B. 514 ; cp. *Stubbs* v. *Slater*, [1910] 1 Ch. 632.

and advantages made by him in performance of the undertaking belong to his principal, and it is his duty to keep true and accurate accounts, and to render them within reasonable time. He is bound to account to his principal for all secret profits.[1] So in *Morison* v. *Thompson*,[2] where the matter is fully discussed and the authorities reviewed, the purchaser of a ship recovered from a broker, employed by him to purchase as cheaply as possible, a sum received from the vendor's broker by way of commission. But to enable the principal to recover, the profits must be clearly the outcome of the special transaction. So if a broker is employed to buy one species of goods, and is promised by third parties a bonus if he succeeds in inducing his employer to buy another species of goods, the latter probably could not claim the bonus as profits made in the course of the agency, unless the broker had undertaken to give all his time to his employer.[3] A broker who takes an interest for himself or for another client in a purchase or sale negotiated by himself, is bound to fully disclose to his principal the exact nature of that interest; and it is not sufficient merely to disclose that he has an interest, or to make such statements as might put the principal on his inquiry.[4]

Subsection (6).—*Rights against Principal.*

561. With regard to commission, if it appears that the broker has been prevented by any wrongful act of his principal from fulfilling his undertaking, it will be due;[5] so the broker's right to commission cannot be defeated by the seller stepping in and himself completing a sale negotiated by the broker; nor by the principal refusing to sell, or changing his terms, or selling the property to another, or by so negligently dealing with the proposed purchaser as to lose the benefit of the sale.[6]

562. With regard to reimbursement and indemnity, see *Watt* v. *Benson & Co.*[7] If the expense or loss has been unnecessarily incurred,[8] or results from the broker's own misconduct or neglect,[9] or actings in excess of his express or implied authority,[10] he cannot recover. Nor is he entitled to indemnity or reimbursement in respect of any transaction obviously or to his knowledge illegal. So when A. employed B. to purchase smuggled goods, and B. did so and paid for them, B. could not recover the price from A., even if A. had obtained possession of the goods.[11] But if the broker is not aware of the illegal

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[1] *Turnbull* v. *Garden*, 1869, 20 L.T. 218; *Pender* v. *Henderson & Co.*, 1864, 2 M. 1428; *Robertson* v. *Dennistoun*, 1865, 3 M. 829.
[2] 1874, L.R. 9 Q.B. 480.
[3] Evans on Agency, 2nd ed., 292.
[4] *Dunne* v. *English*, 1874, L.R. 18 Eq. 524.
[5] *Simpson* v. *Lamb*, 1856, 17 C.B. 603, 618.
[6] Mechem on Agency, s. 967.
[7] 1867, 5 S.L.R. 118.
[8] *Clegg* v. *Townshend*, 1867, 16 L.T.R. (N.S.) 180.
[9] *Duncan* v. *Hill*, 1873, L.R. 8 Ex. 242.
[10] *Fletcher* v. *Marshall*, 1846, 15 M. & W. 755.
[11] *Mather*, 1797, 3 Ves. 373.

intention of the parties, but negotiates the contract in ignorance of its unlawful nature, he may recover compensation and outlays ; and the same is the case where the contract procured by the agent is not itself illegal, although it becomes so by the conduct of one of the parties.[1] As to gambling transactions, see GAMING AND WAGERING ; STOCK EXCHANGE ; and it may be remarked in this connection that the Gaming Act, 1892,[2] has been held not to apply to Scotland.[3]

563. As a broker, in the sense of the term here employed, has generally no possession of the property, he has no general lien such as is given to a factor. And even a factor, who also acts as a broker, has no lien for his general balance on the subjects of the brokerage transactions.[4] But an insurance broker is by general usage intrusted with possession of the policies he effects, and has a lien upon them and sums recovered under them. See LIEN.

SUBSECTION (7).—*Liability to Third Parties.*

564. *Prima facie*, a broker is not liable on the contract.[5] To free him it is not, as a general rule, necessary to name the principal, so long as it is clear on the face of the contract that the broker is a mere agent.[6] But in this case, if the buyer's name is not previously communicated by the broker, the seller has a power of rejection within a reasonable time after disclosure. The broker, however, may incur liability by intention on the face of the contract, making him liable as well as the principal, or by usage of trade ; as in the case of stockbrokers[7] who are liable to each other as principals. See STOCK EXCHANGE.[8] If he signs in his own name unqualified he will be liable.[1] And even if known to be, and described in the contract as, a broker, he may be liable, as in *Hutcheson* v. *Eaton*,[9] where the contract was in this form : " We have this day sold to you the following goods . . . A. & B., brokers," the word " brokers " being held to be merely descriptive. The Court went even further in *Paice* v. *Walker*.[10] There the contract was as follows : " Sold A. J. Paice about 200 quarters wheat (as agents for John Schmidt & Co.), etc. (Signed) Walker & Strange " ; and it was held that the brokers, by merely describing themselves as agents for a named principal in the body of the contract, had not relieved themselves of the liability implied in their unqualified signature. Considerable doubt, however, was thrown on this decision in the later case of *Gadd* v. *Houghton*,[11]

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[1] Evans, p. 407. [2] 55 Vict. c. 9.

[3] *Russell* v. *Grey*, 1894, 1 S.L.T. 529.

[4] *M'Call & Co.* v. *Black & Co.*, 1824, 2 S. App. 188 ; *Dixon* v. *Stansfeld*, 1850, 10 C.B. 398 ; *Mildred* v. *Maspons*, 1883, 8 App. Ca. 874.

[5] *Fairlie* v. *Fenton*, 1870, L.R. 5 Ex. 169.

[6] *Southwell* v. *Bowditch*, 1876, 1 C.P.D. 374.

[7] *Fleet* v. *Murton*, 1871, L.R. 7 Q.B. 126 ; *Humfrey* v. *Dale*, 1858, 7 El. & Bl. 266 ; *Pike* v. *Ongley*, 1887, 18 Q.B.D. 708, Custom of Hop Trade.

[8] *Mackenzie & Aitken* v. *Robertson*, 1886, 13 R. 494 ; *Müller & Co.* v. *Weber & Schaer*, 1901, 3 F. 401.

[9] 1884, 13 Q.B.D. 861, [10] 1870, L.R. 5 Ex. 173. [11] 1816, 1 Ex. D. 357.

and it can hardly be looked on as an authority. " According to some of the earlier authorities," says Mr. Benjamin, " it required very strong internal evidence to rebut the presumption of liability arising from an unqualified signature to the contract. But the later authorities, as well as some of the earlier ones, warrant the proposition that in the absence of usage the question is one of the construction of the contract as a whole, together with all the surrounding circumstances, and that the signature being made without qualification is only one fact to be considered in construing the contract. . . . Where the signature of the agent is followed by qualifying language, as where he signs ' for ' or ' on account of,' or ' on behalf of,' his principal, or ' as agent ' or ' in the capacity of agent,' it would require very strong language in the body of the contract to fix him with liability." [1] The whole subject has now been elaborately discussed in *Universal Steam Navigation* v. *M'Kelvie & Co.*[2]

565. But a broker who is liable from having contracted in his own name may be relieved of liability by the other party's election of the principal as the responsible person.[3] The principal's liability is not affected by the fact that credit was given to the broker ; [4] but the fact of election once established, the other party is finally relieved. If a broker contracts for an alleged principal he cannot be made liable as a contracting party simply because a principal does not exist. The remedy of the other party is an action of damages for breach of the implied contract that the broker had the authority he professed to have, or for misrepresentation,[5] the measure of damages being the amount that would have been recoverable from the alleged principal if he had duly authorised, and refused to perform, the contract.[6] If a person professes to act as broker, but it is proved that he is in fact the principal, acting on his own behalf, he is liable on the contract.

566. A broker who contracts for a principal, and in regular course of trade sells goods for him whom, in good faith, he believes to be the owner, is not liable to the true owner of the goods. But a broker who, however innocently, obtains possession of goods of which a person has been fraudulently deprived, and disposes of them as being himself the principal, is liable to the true owner,[7] but only *quantum lucratus* if the sale was in public market in Scotland.[8]

Subsection (8).—*Rights against Third Parties.*

567. It follows from the nature of his employment, that so long as a broker acts within the scope of his authority he can have no right to

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[1] Benjamin on Sale, 5th ed., 256 ; and see *Homfrey, ut supra ; Fleet, ut supra.*
[2] [1923] A.C. 492.
[3] *Ferrier* v. *Dods*, 1865, 3 M. 561.
[4] *Waring* v. *Favenck*, 1807, 1 Camp. 85.
[5] *Hollman* v. *Pullen*, 1884, 1 Cab. & El. 254.
[6] *Simons* v. *Patchett*, 1857, 7 El. & Bl. 568 ; *Randell* v *Trimen*, 1856, 18 C.B. 786 ; Addison, 10th ed., 896 ; Chitty, 15th ed., 277.
[7] *Hollins* v. *Fowler*, 1872, L.R. 7 H.L. 757.
[8] Bell, Prin. 527.

sue on the contract. The moment the sale is completed, the broker is as a rule *functus officio*, and can neither sue nor be sued ; [1] but he may have such an interest in the subject-matter of the contract as to warrant his suing in his own name.[2] So where a broker had advanced money on the credit of a cargo consigned for sale, he was entitled to an action, although the sale note gave the principal's name ; and the buyer could not set off a debt due to him by the principal.[3] If, however, by the introduction of the name of the principal into the contract, the defender has been prejudiced, he will be entitled to use that as a defence.[4] But in *Smith* v. *Watson* [5] it was held that a broker who had stipulated with his principal for a share of the profit, and was liable for a share of any loss incurred, had no such interest as entitled him to an action on the contract.

Subsection (9).—*Relations of Principal and Third Parties.*

568. The principal's right to enforce contracts made by his agent is subject to this qualification : that if the broker is allowed to deal in his own name, the party dealing with him will enjoy the same rights and equities against the employer as he would have had against the broker had he really been a principal.[6] When the broker has not contracted in his own name, nor been intrusted with possession of the property, third persons cannot set-off against the principal debts due by the broker.[7]

Section 8.—Factors.

569. In Scotland, the word factor is seldom used except in the limited sense of an agent for landed estate, or in connection with the Factors Acts (*vide infra*, Section 9) or Factor's Lien (see Lien). Bell,[8] while stating that the names factor and agent are generally confounded, distinguishes the former from the latter as having authority to manage all the principal's affairs in the place where he resides, or in a particular department. This distinction is not now recognised. In England, a factor is distinguished from a broker in being intrusted with the possession of the goods, and being empowered to contract in his own name ; and from an agent, in having a lien on the goods intrusted to him,[9] and this has to a certain extent been adopted in Scotland. [See Factory and Commission ; Lien.]

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[1] *Blackburn* v. *Scholes*, 1810, 2 Camp. 341.
[2] *Levy* v. *Thomsons*, 1883, 10 R. 1134.
[3] *Atkyns*, 1796, 2 Esp. 493.
[4] Addison on Contracts, 10th ed., 321.
[5] 1824, 2 B. & C. 401.
[6] *Sims* v. *Bond*, 1833, 5 B. & A. 389 ; *Blackburn, supra ; Warner* v. *M'Kay*, 1836, 1 M. & W. 591.
[7] *Liddell* v. *Young & Son*, 1852, 14 D. 647 ; *Baring* v. *Corrie*, 1818, 2 Barn. & Ald. 137 ; *Cooke* v. *Eshelby*, 1887, 12 App. Ca. 271.
[8] Bell, Com. i. 506.
[9] *Stevens* v. *Biller*, 1883, 25 Ch. D. 31 ; Smith, Merc. Law, 118 *et seq. ; Baring, supra.*

Section 9.—Mercantile Agents.

Subsection (1).—*General.*

570. This section applies only to " mercantile agents " in the special sense of the Factors Acts. The Factors Act, 1889,[1] extended to Scotland by the Factors Act, 1890,[2] is a consolidating statute, which repeals and reproduces the provisions of a series of Acts passed in 1823, 1825, 1842, and 1877 (see, however, *Turner*, *infra*). The general object of this branch of legislation may be said to have been to bring the law of possession of moveable property, regarded as a title to dispose of it, into accordance with the general feeling and everyday usages of business men.[3] The ordinary trade understanding is that if a man is in possession of mercantile commodities, or of documents of title, he may be assumed either to be their owner, or, if not, to be an agent having authority from the owner to dispose of them, and that, in the latter case, the owner should be the sufferer in the event of a fraudulent or improper disposition by the agent, rather than a third party transacting on the faith of the apparent authority to dispose conferred by the possession of the commodities or documents. To carry out this view to its fullest extent would be to assimilate the transfer of moveable property to that of negotiable instruments ; the Factors Acts steer a middle course between that extreme and the principle of the common law (more particularly in England), that the purchaser or pledgee of moveable property of the ordinary mercantile character took, except in the case of sales in market overt, no better title than his author, and was subject to all exceptions which were pleadable against him.[4] It may be remarked that in certain respects, *e.g.* the implied power of a factor or agent to pledge, the common law of Scotland was more advanced than that of England, and therefore the provisions of the Factors Acts are more nearly declaratory of the Scotch than of English law.[5]

571. The Factors Act, 1889, contains, in addition to the interpretation clause and certain supplemental clauses, two classes of provisions, the one headed " Dispositions by mercantile agents," the other " Dispositions by buyers and sellers of goods." The former subject alone is treated in this article ; for the latter see Sale.

Subsection (2).—*Definition.*

572. A mercantile agent is defined, for the purposes of the Act, as (s. 1) " a mercantile agent having in the customary course of business as such agent authority either to sell goods, or to consign goods for the

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[1] 52 & 53 Vict. c. 45.
[2] 53 & 54 Vict. c. 40.
[3] See Factors Act, 1842, 5 & 6 Vict. c. 39, s. 1.
[4] Per Ld. Blackburn in *Cole* v. *N.W. Bank*, 1875, L.R. 10 C.P. 354, at p. 363.
[5] Cp. Bell, Prin. s. 1364, with opinion of Ld. Blackburn in *Cole*, cited *supra*.

purpose of sale, or to buy goods, or to raise money on the security of goods." This definition is new, as the former Acts referred generally to an "agent intrusted with the possession of goods," but it is not supposed that the class of persons to whom the Act applies is altered or enlarged. That class would seem to be confined to persons engaged in ordinary commercial transactions—as agents, factors, or brokers.[1] Thus under the existing Act it has been held that it does not cover a commercial traveller, even although he is intrusted with goods and not merely with samples.[2] It has been held in England to apply to an agent employed to sell jewellery on commission.[3] The former Acts were held not to be applicable to clerks, shopmen, or messengers,[4] or to persons employed solely as warehousemen, or as agents for the safe custody or forwarding of goods, without any authority to sell or pledge them.[5] Thus where A., a merchant in Spain, purchased goods from a firm of manufacturers in Ireland, and directed them to be sent to B., a merchant in Dundee, solely for the purpose of forwarding them to Spain, it was held that B. was not an agent within the meaning of the Factors Act, 1842, and that a person to whom he fraudulently pledged the goods could not appeal to its provisions in a question with A.[6] And it was settled that the Acts did not apply to the case where a mercantile agent, who also carried on business of another kind, received goods in the course of that other business, and improperly sold or pledged them.[7] It is probable that this important limitation of the scope of the Factors Acts is still applicable under the Act of 1889, and that if goods were placed for safe custody in the hands of a warehouseman who happened also to be a broker, a fraudulent sale by him would not be protected, as a disposition by a mercantile agent. Again, the Act is not applicable to a person who merely pretends to be an agent; and thus, where a broker fraudulently obtained possession of goods from A., and sold them to B. under the pretence that he was an agent for A., it was held that B. could not maintain a title to the goods under the Factors Acts.[8]

Subsection (3).—*Dispositions.*

573. The main provision with regard to dispositions by a mercantile agent, as defined above, is as follows (s. 2, subs. 1): "Where a mercantile agent is, with the consent of the owner, in possession of goods or of the

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[1] See *Turner* v. *Sampson*, 1911, 27 T.L.R. 200; *Heap* v. *Motorists Advisory Agency*, [1923] 1 K.B. 577.

[2] *International Sponge Importers, Ltd.* v. *Watt*, 1909, 2 S.L.T. 24.

[3] *Weiner* v. *Harris*, [1910] 1 K.B. 285, overruling *Hastings* v. *Pearson*, [1893] 1 Q.B. 62.

[4] *Lamb* v. *Attenborough*, 1862, 1 B. & S. 831, per L. Blackburn in *Cole, supra.*

[5] *Martinez y Gomez* v. *Allison*, 1890, 17 R. 332; *Hellings* v. *Russell*, 1875, 33 L.T (N.S.) 380.

[6] *Martinez y Gomez, supra.*

[7] *Monk* v. *Whittenbury*, 1831, 2 B. & Ad. 484; *Cole, supra*; *City Bank* v. *Barrow*, 1880, 5 App. Ca. 664.

[8] *Gillman, Spence & Co.* v. *Carbutt*, 1889, 61 L.T. 281; cp. *Morrisson* v. *Robertson*, 1908, S.C. 332; 15 S.L.T. 697.

documents of title to goods, any sale, pledge, or other disposition of the goods, made by him while acting in the ordinary course of business as a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorised by the owner of the goods to make the same ; provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same." An illustration of the class of cases to which this section is applicable may be found in the case of *Vickers* v. *Hertz*.[1] Vickers, who was in possession of iron warrants, issued by the Carron Co., instructed Campbell Bros., who acted as brokers and merchants in iron, to find a purchaser for them. On receiving notice that a purchaser had been found, he sent the iron warrants indorsed to Campbell Bros. That firm had not, in fact, found a purchaser, and, on receiving the warrants, they fraudulently pledged them for their own benefit. It was held that the Factors Acts were applicable, because Campbell Bros. were agents intrusted with the possession of documents of title, and therefore that the pledgee obtained a good title in a question with Vickers. It has been held that handing over goods to an auctioneer for sale is not an " other disposition " within the meaning of the section.[2] The onus of proving good faith and absence of notice rests on the buyer.[3]

574. It is expressly declared that where a mercantile agent pledges goods for a debt or liability of his own already existing, he can give no better title than he has himself,[4] but the title obtained by a pledgee from a mercantile agent who had no authority except to sell is not affected by proof that by the custom of the particular trade an agent to sell had no authority to pledge.[5]

575. It is important that the possession of the goods should be obtained with the " consent of the owner " as defined partly by the Act and partly by decisions. This is to be presumed, in the absence of evidence to the contrary (s. 2, subs. 4). Where an agent has been in possession of goods with the consent of the owner, any disposition by him which would have been valid if the consent had continued, shall be valid although the consent has determined, provided that the party taking under the disposition does so without notice (s. 2, subs. 2). And where possession of documents of title is obtained by an agent by reason of his having been, with the consent of the owner, in possession of goods or of other documents of title, his possession shall be deemed to be with the consent of the owner. This meets a case, to which the former Factors Acts were held not to apply, where an agent was intrusted with the possession of a bill of lading, landed the cargo under it in a warehouse, and pledged the dock warrants.[6] Where A. sold wine lying in a cellar to B., to be paid for by cash on delivery, and B., without paying the price,

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[1] 1871, 9 M. (H.L.) 65.
[2] *Waddington* v. *Neale*, 1907, 96 L.T. 786.
[3] *Heap, supra.*
[4] Sec. 4 ; *Martinez y Gomez, supra.*
[5] *Oppenheimer* v. *Attenborough*, [1908] 1 K.B. 221.
[6] *Philipps* v. *Huth*, 1840, 6 M. & W. 572.

induced the keeper of the cellar to allow him to remove the wine, which he stored in another cellar and pledged to a third party, it was held that A. had never consented to B. being in possession of the wine, and that the Factors Act was not applicable.[1]

576. There is no doubt in Scotland that the consent may be obtained by fraud.[2] In England, however, it has been held that if the fraud amounts to "larceny by a trick" it precludes consent.[3] This is of doubtful application to Scotland. If, however, the mercantile agent obtains possession by representing himself to be somebody else, he has then absolutely no title to be in possession of the goods at all, and cannot give to a purchaser any better right than if he had obtained them by theft.[4] The mere fact that the owner has been careless is not sufficient to bar him from denying his consent.[5] That the agent was forbidden to part with the goods is immaterial.[6]

577. The Act is only applicable to transactions in the ordinary course of business of a mercantile agent. Thus, as already stated, it does not apply to the business of a pedlar.[7] And where a jeweller, who was employed to sell an article, disposed of it for £30 in cash, and an obligation on the part of the purchaser to satisfy a debt due by the jeweller to a third party, it was held that this transaction was outside the ordinary course of business, and that, in consequence, the Factors Act was not applicable.[8]

Subsection (4).—*Pledge of Documents of Title.*

578. By sec. 3 it is declared that "a pledge of the documents of title to goods shall be deemed to be a pledge of the goods." The question was raised in the case of *Inglis* v. *Robertson & Baxter*,[9] whether this section introduces into the law of Scotland the principle that the mere pledge of a delivery-order, or other similar instrument, constitutes an effectual security over the goods, without that intimation to the warehouse-keeper which would have been necessary at common law.[10] It was held that it does not, on the ground that s. 3, being in a part of the Factors Act, headed "Dispositions by mercantile agents," applied only to cases where the pledge was made by a mercantile agent, and not where, as in the case under consideration, the pledge was made by the owner of the goods.[11]

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[1] *Robinson* v. *Restall*, 1896, 12 T.L.R. 174; and see *Oppenheimer* v. *Fraser*, [1907] 2 K.B. 50.

[2] *Vickers* v. *Motorists Advisory Agency*, [1923] 1 K.B. 577.

[3] *Heap, supra*; cp. *Folkes* v. *King*, [1923] 1 K.B. 282.

[4] *Cundy* v. *Lindsay*, 1878, 3 App. Ca. 459; *Morrisson* v. *Robertson*, 1908 S.C. 332; cp. *Phillips* v. *Brooks*, [1919] 2 K.B. 243.

[5] *Heap, supra.*

[6] *Fuller* v. *Glyn*, [1914] 2 K.B. 168.

[7] *Hastings* v. *Pearson*, [1893] 1 Q.B. 62.

[8] *Biggs* v. *Evans*, [1894] 1 Q.B. 88.

[9] 1898, 25 R. (H.L.) 70.

[10] *Connal & Co.* v. *Loder*, 1868, 6 M. 1095.

[11] See also *Hayman & Son* v. *M'Lintock*, 1906, 13 S.L.T. 863.

Subsection (5).—*Further Provisions relating to Mercantile Agents.*

579. The other provisions of the Act under the heading of "Dispositions by mercantile agents" may be briefly summarised. By s. 5 it is provided that the consideration for the sale, pledge, or other disposition referred to in the previous sections may consist either in payment in cash, or of a transfer of other goods, documents of title, or securities, provided that where goods are pledged by an agent in consideration of the transfer of other goods or documents of title, the pledgee shall acquire no interest in the goods beyond the value of what he gave in exchange. In the application of this section to Scotland, it is provided that a sale, pledge, or other disposition shall not be valid unless made for valuable consideration as thus defined.[1] And it should be borne in mind that the provisions of the Act will only be applicable to a transaction in the nature of barter if such a transaction is in the ordinary course of the business of the mercantile agent (see s. 2, subs. 2, *supra*). By sec. 7 the lien (defined as including, in Scotland, a right of retention) [1] of a consignee in respect of advances made to the consignor is extended to the case where a consignee has made advances to a person who has been placed in possession of goods for consignment or sale, or in whose name the goods have been shipped, provided that the consignee had no notice that that person was not the owner of the goods. A saving clause preserves the right of the owner of goods to recover them from his agent, or his trustee in bankruptcy, at any time before they are sold or pledged; to recover the goods, or, if they are sold, the price, from a person to whom they have been pledged by the agent, on satisfying the claim of the pledgee; and to recover the price of the goods from a party to whom they have been sold by the agent, subject to any right of set-off which such purchaser may have against the agent (s. 12). It is declared that the provisions of the Act are to be construed in amplification and not in derogation of the powers which an agent may exercise independently of the Act.

Section 10.—Del Credere Agents.

Subsection (1).—*General.*

580. It is unnecessary to consider particularly the relations between the parties to a *del credere* contract, for the *del credere* nature of the engagement has no effect on the general validity and extent of the agent's authority—a *del credere* agent differing from other agents only in respect of his obligation to guarantee.[2] The appointment may be express; or inferred from the conduct of the parties; or implied by usage of trade.[3] In the case of agents for foreign principals, it was

[1] Factors Act, 1890, s. 1, subs. 2.
[2] Per Mellish, L.J., in *ex parte White*, 1871, L.R. 6 Ch. 403.
[3] *Stein's Assignees* v. *Brown*, 1828, 7 S. 47.

formerly implied, if nothing was said to the contrary, that the agent should receive a *del credere* commission and guarantee his sales.[1] Owing to the change in the general law with regard to foreign principals it is doubtful if this still holds good.

581. Commission is due immediately a contract is made.[2] The fact that the agent describes himself as "*del credere* agent" does not mean that he guarantees the buyer; it is primarily referable to the seller.[3] In the event of the buyer's failure the agent may claim on his estate in satisfaction of his obligation to guarantee.

Subsection (2).—*Obligations to Principal.*

582. *Del credere* is an Italian mercantile law term, nearly equivalent to guarantee or warranty. An agent is said to undertake a *del credere* engagement when, for an additional consideration, called *del credere* commission, he guarantees to his principal the solvency of third parties. The engagement is most frequently met with in the case of agents to whom goods are consigned for sale, but a *del credere* commission may be undertaken by any agent conducting transactions involving the credit and responsibility of persons unknown to the principal, as, for instance, by a bank agent or an insurance broker.[4]

583. The precise nature and scope of the obligations undertaken by a *del credere* agent have been much discussed. It is stated by Mr. Bell[4] that the agent is in precisely the same position as if he had received on loan the money of the principal; and no payment that would not be effectual as between debtor and creditor will discharge his responsibility.[5] It is further stated that the guarantee is not on the one hand a cautionary obligation in the ordinary sense of the term; for the factor with a *del credere* commission is liable to his principal directly, and without any benefit of discussion; neither is it, on the other, to all intents and purposes a *delegatio debiti*, for if the guarantee fail, the principal is entitled to resume his character and recover from the proper debtor, if he have not previously paid to the guarantee; and Mr. Bell refers to L. Mansfield's *dictum* in *Grove* v. *Dubois*,[6] to the effect that "this is an absolute engagement to the principal by the broker, and makes him liable in the first instance." But later English cases have discredited this doctrine, and the principle now accepted in England is that the *del credere* agent is merely a cautioner, and liable only on the buyer's failure.[7] If any dispute arises on a contract the principal is not entitled to sue the agent; the latter is only liable to pay any ascertained sum

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[1] Bell, Com. i. 395.

[2] *Solly* v. *Weirs*, 1818, 2 Mor. 420; *Caruthers* v. *Graham*, 1811, 14 East 578.

[3] *Nouvelles Huileries Anversoires* v. *Mann & Co.*, 1924, 40 T.L.R. 864.

[4] Bell, Com. i. 395.

[5] *Scott*, 1795, Bell's Oct. Ca. 138.

[6] 1786, 1 T.R. 112.

[7] *Morris* v. *Cleasby*, 1816, 4 M. & S. 566; *Hornby* v. *Lacy*, 1817, 6 M. & S. 166; Smith's Mercantile Law. 127.

which is due by the buyer.[1] In Scotland, the question does not seem to have been judicially decided; but it may be said that in America the decisions seem to favour the doctrine as stated by Mr. Bell, and to affirm the agent's primary liability.[2] It must, however, be noticed, that although in England a *del credere* agent is a mere cautioner, his guarantee is not within the Statute of Frauds, and does not require to be proved in writing. If the agent, for a percentage, guaranteed the debt owing, or performance of the contract, by the vendee, being totally unconnected with the sale, he would not be liable without a note in writing signed by him; but as he is primarily the agent to negotiate the sale, a higher reward is paid merely in consideration of his guaranteeing the solvency of the vendees. The guarantee may result in a liability to pay the debt of another, but that is not the *immediate* object for which the consideration is given.[3]

584. The analogous question of whether, in Scotland, a *del credere* guarantee falls within sec. 6 of the Mercantile Law Amendment Act, 1856, has not been raised, but it probably does not, on the principle that the contract is primarily one of mandate and not of guarantee, the latter being merely a condition regulating the agency.[4] The distinction between *del credere* agency and sale is discussed in *Michelin Tyre Co.* v. *Macfarlane*.[5]

Subsection (3).—*Compensation.*

585. The buyer has a right of retention or compensation against the principal, the exercise of which will be a good answer to the agent's claim, and will at the same time discharge the guarantee.[6] If the agent and buyer are both insolvent, the principal may claim on both estates for the full amount of his debt, but not to the effect of obtaining more than twenty shillings in the pound. Mr. Bell also states,[7] on the authority of the case of *Grove*, *supra*—and the statement is repeated in Goudy on Bankruptcy[8]—that a *del credere* agent may set off the buyer's debt against a debt due by him to the buyer, "upon the ground that although the principal has collateral recourse against the purchaser, the factor is liable in the first instance to his principal, and has a direct claim against the purchaser." But this statement must be read in the light of the modification of the English doctrine already referred to, according to which the agent is liable only on the failure of the third party. The purchaser cannot plead against the principal compensation on a proper debt of the agent, the *del credere* engagement being *res inter alios*.[9] See Compensation.

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[1] *Gabriel* v. *Churchill*, [1914] 3 K.B. 1272.
[2] *Wolff Koppel*, 1845, 43 Am. Dec. 751; *Lewis Bros.* v. *Brehme*, 1870, 3 Am. Rep. 190.
[3] Per Parke, B., in *Couturier* v. *Hastie*, 1852, 8 Exch. 40; and see *Sutton* v. *Grey*, [1894] 1 Q.B. 285.
[4] Bell, Prin. 286, note (*a*).
[5] 1917, 55 S.L.R. 35.
[6] Bell, Com. i. 538.
[7] Com. ii. 126.
[8] 3rd ed., 611.
[9] Bell, Com., *supra*; Goudy, *supra*.

Subsection (4).—*Rights against Third Parties.*

586. A *del credere* agent has not sufficient interest, in England at any rate, to entitle him to enforce a contract entered in on behalf of his principal.[1]

Section 11.—Negotiorum Gestio.[2]

Subsection (1).—*Definition.*

587. This is a quasi-contractual relationship derived from Roman law, where it was first recognised by the Prætors under their edict *causa utilitatis*, and later enforced by the *actio negotiorum gestorum directa*.[3] It has been adopted by the law of Scotland in almost every respect.[4] There is a *negotiorum gestio* wherever one person spontaneously undertakes the management of the affairs of another who is absent,[5] in prison,[6] or incapacitated through insanity[7] or nonage.[8] It may even extend to a case where the other is merely unable at the moment to discharge his liabilities,[9] but not apparently to one where the party *lucratus* is able but unwilling to do so.[10] The relationship is similar in many respects to an agency of necessity.[11] Its existence may be established by parole evidence.[12]

Subsection (2).—*Duties of Gestor.*

588. He is bound to carry out the business he undertakes in a prudent and reasonable manner.[13] In Roman law he was always required to use *omnis diligentia*, but in Scots law the standard of duty varies according to the circumstances which prompted his intervention.[14] He is also bound to account and to hand over any profit which accrues to him.[15]

Subsection (3).—*Rights of Gestor.*

589. He is entitled (*a*) to reimbursement of his necessary outlays and to interest upon them, and (*b*) to relief from any obligations reason-

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[1] *Bramwell* v. *Spiller*, 1870, 21 L.T. 672.

[2] Inst. iii. 27, 1; More Notes, liv. cclxiii.; Bell, Com. i. 287; Gloag on Contract, 274–276, 413.

[3] Dig. iii. 5; Code, ii. 18.

[4] Stair, i. 8, 3; Ersk. i. 3, 5; Bell, Prin. 540.

[5] *Smith's Heirs* v. *Earl of Winton*, 1714, M. 9273; *Bannatine's Trs.* v. *Cunninghame*, 1872, 10 M. 319.

[6] *Gemmell* v. *Annandale*, 1899, 36 S.L.R. 658.

[7] *Graham* v. *Ker*, 1757, M. 3529, 1758; 2 Paton 13; *Dunbar* v. *Wilson & Dunlop's Tr.*, 1887, 15 R. 210; *Fernie* v. *Robertson*, 1871, 9 M. 437.

[8] *Fulton* v. *Fulton*, 1864, 2 M. 893; *Paterson* v. *Greig*, 1862, 24 D. 1370.

[9] *Reid* v. *Ld. Ruthven*, 1918, 55 S.L.R. 616, per Ld. Anderson (Ordinary).

[10] *Wallace* v. *Braid*, 1900, 2 F. 754.

[11] *Vide supra*, para. 496.

[12] *Spreul* v. *Crawford*, 1641 M. 16201; *Marshall* v. *Lyell*, 1859, 21 D. 514, at 521.

[13] *Graham, supra.*

[14] Ersk. iii. 3, 5, 3; *Fulton, supra*; *Bannatine's Trs., supra.*

[15] Dig. 3, 5, 3, 2.

ably incurred ; but not to any remuneration.[1] The *dominus negotii* is bound to fulfil these obligations even though he is not *lucratus*, except in cases where there is no real necessity for the *gestor's* intervention.[2]

Subsection (4).—*Liability of Dominus.*

590. In addition to these duties with regard to the *gestor*, the *dominus* or *quantum lucratus* his estate is liable to third parties with whom contracts have been made on his behalf.[3]

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[1] Stair, i. 8, 3 ; Ersk. iii. 3, 52, 53 ; *Smith's Heirs, supra* ; *Campbell* v. *Creditors on the Equivalent*, 1725 M. 9276 ; *Fernie* v. *Robertson*, 1871, 9 M. 437.

[2] Dig. 15, 3, 11.

[3] *Fernie, supra ; Dunbar* v. *Wilson & Dunlop's Tr.*, 1887, 15 R. 210.

AGENTS FOR POOR.

See COURT OF SESSION.

AGGRAVATION.

See CRIME.

AGNATE.

See LUNACY; SUCCESSION; TUTORS AND CURATORS.

AGREEMENT.

See CONTRACT; ERROR; FRAUD.

AGRICULTURE, BOARD OF.

See OFFICERS AND DEPARTMENTS OF STATE.

AGRICULTURAL HOLDINGS (SCOTLAND) ACTS.

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Section 1.—Prior Legislation.

591. The first Agricultural Holdings Act was passed in 1883.[1] The general objects of this Act and of the subsequent Acts extending it have been to promote the interests of agriculture by abolishing certain common law presumptions and privileges which favoured the landlord and by conferring new rights on tenants. The Act of 1883 was amended by Acts of 1897 (Market Gardeners' Compensation [2]), 1900,[3] and 1906.[4] These Acts were repealed and consolidated by the Act of 1908.[5] The Act of 1908 was amended by Acts of 1910,[6] 1920,[7] and 1921,[8] and these Acts were repealed and consolidated by the Act of 1923.[9] This Act was amended in a minor particular by the Amending Act of 1923.[10] Legislation in England has followed a similar course.

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[1] 46 & 47 Vict. c. 62.
[2] 60 & 61 Vict. c. 22.
[3] 63 & 64 Vict. c. 50.
[4] 6 Edw. VII. c. 56.
[5] 8 Edw. VII. c. 64.
[6] 10 Edw. VII. & 1 Geo. V. c. 30.
[7] 10 & 11 Geo. V. c. 76.
[8] 11 & 12 Geo. V. c. 17.
[9] 13 & 14 Geo. V. c. 10.
[10] 13 & 14 Geo. V. c. 25.

Section 2.—Scope of Act.

592. The Act applies (s. 49) to "any piece of land held by a tenant which is either wholly agricultural or wholly pastoral or in part agricultural, and as to the residue pastoral or in whole or in part cultivated as a market-garden," provided it is not let to a tenant who is employed by his landlord for the duration of such employment. This definition provides for no minimum size, and accordingly includes holdings which come within the scope of the Small Holdings Acts. (See Small Landholders.) Where a holding includes land which does not fall within the definition, such "non-statutory land" is to be excluded and the Act applied to the rest of the holding (s. 33).

593. The meaning of the definition of a holding has been discussed in a number of cases. The fact that the dwelling-house is of much greater value than the land attached to it does not prevent the house and land combined being treated as a holding.[1] In a number of cases the fact that the holding included a non-agricultural element has been held to exclude it from the definition[2] (but s. 33 would now apply to such cases); but a small non-agricultural element is immaterial.[3] Extra dwelling-houses have been excised from the holding.[4] The definition of a market-garden has also given rise to difficulties. Holdings have been held to be market-gardens where the whole holding was under raspberries,[5] where the sole produce was flowers,[6] and where the whole holding was under glass,[7] but not where an occupier of residential property sold produce surplus to his own requirements.[8] It is doubtful whether "tenant" includes subtenant.[9] The Act does not apply to leases for less than one year. The terms "landlord" and "tenant" are defined so as to include the predecessors and successors in title of any landlord or tenant.

594. The Act provides that any contract by virtue of which a tenant's right to claim compensation under the Act is taken away or limited shall to that extent be void (s. 45). This provision strikes at any agreement which in any way excludes a claim which might otherwise be competently made,[10] but does not prevent the landlord stipulating

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[1] *Malcolm* v. *M'Dougall*, 1916 S.C. 283; *Hamilton* v. *Duke of Hamilton's Trs.*, 1918 S.C. 282; but see *Taylor* v. *Earl of Moray*, 1892, 19 R. 399.

[2] *Mackintosh* v. *Lord Lovat*, 1886, 14 R. 282 (hotel); *Stormonth Darling* v. *Young*, 1915 S.C. 44 (blacksmith's shop); *Yool* v. *Shepherd*, 1914 S.C. 689 (spinning mill); *Lancaster* v. *MacNamara*, [1918] 2 K.B. 472 (inn); *Magistrates of North Berwick* v. *Wilson*, 1907, 23 S.L. Rev. 243 (golf course).

[3] *Taylor* v. *Fordyce*, 1918 S.C. 824 (porter and ale license); *Russell* v. *Harding*, 1923, 39 T.L.R. 92 (dwelling-house sublet).

[4] *M'Neill* v. *Duke of Hamilton's Trs.*, 1918 S.C. 221.

[5] *Grewar* v. *Moncur's Cur. Bon.*, 1916 S.C. 764.

[6] *Drummond* v. *Thomson*, 1921, 37 S.L. Rev. 180.

[7] *Purser* v. *Worthing Local Board*, 1887, L.R. 18 Q.B.D. 818.

[8] *Bickerdyke* v. *Lucy*, [1920] 1 K.B. 707.

[9] See *Livingstone* v. *Beattie*, 1891, 18 R. 735.

[10] *Cathcart* v. *Chalmers*, 1911 S.C. (H.L.) 38; *Mears* v. *Callender*, [1901] 2 Ch. 388.

for certain deductions from the compensation ultimately assessed.[1] Sec. 45 only deals with compensation, and it is doubtful how far parties can contract out of sections of the Act which deal with other matters. It is also doubtful how far s. 45 applies to bargains made regarding compensation at the termination of a lease. In the absence of a clear stipulation a tenant renouncing his lease does not renounce his right to compensation,[2] but it would seem that a tenant in agreeing to terminate his tenancy might competently agree to renounce his claim for compensation.[3]

595. Probably the most important provisions of the Act are those dealing with compensation. Compensation may be payable under the Act by the landlord in respect of (1) improvements (s. 1); (2) disturbance (s. 12); (3) adoption by tenant of special standard of farming (s. 9); and (4) damage by game (s. 11). Compensation may be payable by the tenant in respect of deterioration of the holding (s. 10). The Act contains elaborate provisions for the settlement of these and other matters by arbitration, and also modifies the previously existing law regarding a number of different matters.

Section 3.—Compensation for Improvements.

596. At common law a tenant who improves a holding is not, apart from special stipulation, entitled to any compensation for so doing, even though the lease should terminate prematurely.[4] The Act provides (s. 1) for compensation being payable for such improvements as are specified in its schedule (but for no others), provided that the requirements of the Act have been complied with. No compensation is due until the tenancy terminates and the tenant quits the holding—until that time the tenant is in full enjoyment of the improvement—but on quitting the holding the tenant is entitled to obtain from the landlord such sum as fairly represents the value of the improvement to an incoming tenant. Under the older Acts it had been decided that a tenant was not entitled to compensation for an improvement which he was bound by his lease to make,[5] but the 1923 Act alters this and provides that, when the lease has been entered into since 1st January 1921, compensation is payable even though the tenant is bound to make the improvement.[6] The value of an improvement has no necessary relation to its cost, but cost is always considered as a very important element. In cases of difficulty "the value of an improvement can only be measured by the addition of value to the holding as a whole."[7]

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[1] *Buchanan* v. *Taylor*, 1916 S.C. 129.

[2] *Strang* v. *Stuart*, 1887, 14 R. 637.

[3] See *Roger v. Hutchison*, 1921 S.C. 787, per L. Salvesen.

[4] Rankine, Leases, p. 259; *Scott's Exrs.* v. *Hepburn*, 1876, 3 R. 816; *Walker* v. *M'Knight*, 1886, 13 R. 599.

[5] *Earl of Galloway* v. *M'Clelland*, 1915 S.C. 1062.

[6] *Huckell* v. *Saintey*, [1923] 1 K.B. 150.

[7] Per L. Pres. Clyde in *Mackenzie* v. *Macgillivray*, 1921 S.C. 722.

597. The landlord who pays compensation is generally the landlord at the moment when the tenant removes, even though an earlier landlord gave the notice to remove, but a landlord who becomes landlord after the tenant quits is not liable to pay compensation.[1] " Landlord " is defined (s. 49) so as to include any person for the time being entitled to receive the rents, and this definition includes persons who are not " absolute owners," *e.g.* liferenters, holders of a decree of maills and duties, etc. Such persons have the full powers of an " absolute owner " (s. 39), and they are entitled (ss. 21 and 24) on paying compensation to recover the sum paid by charging it on the holding. The Act makes provision (s. 7) for an incoming tenant undertaking, with the landlord's consent, to pay the compensation recoverable by the outgoing tenant and ultimately recovering from the landlord the value of the improvements for which he has paid as at the date of his (the incoming tenant's) ultimate waygoing. Provision is also made (s. 8) for a tenant who occupies a holding during two or more tenancies, recovering compensation for improvements made by him before his last tenancy commenced.

598. In ascertaining the amount of compensation payable, an arbiter is required to take into account (s. 1 (2) (*a*)) any benefit which the landlord has given or allowed to the tenant in consideration of his making the improvement, whether the benefit is stated in the lease to be so given or not. The meaning of the word " benefit " has been discussed in several cases. In *M'Quater* v. *Fergusson*[2] the tenant claimed compensation in respect of manures which, by his lease, he was bound to apply. The landlord maintained that he had allowed a benefit to the tenant in respect that he had accepted a lower rent in view of the provisions of the lease regarding manuring. It was held that this was not a benefit within the meaning of the Act, not having been specially mentioned and allowed.[3] The 1923 Act dispenses with special mention of the benefit (s. 1 (2) (*a*)), but it must still be of a definite nature and specially allowed. In *Findlay* v. *Munro*,[4] the tenant was entitled by his lease to take two white crops in succession ; opinions were expressed that this was not a " benefit." In *Mackenzie* v. *Macgillivray*,[5] the landlord attempted to prove that he had prolonged the tenancy in respect of the tenant making improvements : he was unsuccessful in proving this, but the Court inclined to the view that, if proved, this might have been a benefit.

599. The tenant need give no notice of a claim for compensation for improvements before he removes from the holding, but particulars of such a claim, as of all other claims (see para. 619, *infra*), must be given within two months after removing.

600. The improvements included in the Schedule of the Act are divided into three classes, which may be called permanent, semi-permanent, and temporary respectively.

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[1] *Waddell* v. *Howat*, 1925 S.C. 484.
[2] 1911 S.C. 640.
[3] See also *Earl of Galloway* v. *M'Clelland*, 1915 S.C. 1062.
[4] 1917 S.C. 419.
[5] 1921 S.C. 722.

601. *Permanent Improvements.*—The improvements set out in Part I. of the First Schedule of the Act include such matters as erection, alteration or enlargement of buildings, laying down permanent pasture, making of roads, permanent fences, sheep-dipping accommodation, etc. The Act provides with regard to these (s. 2) that no compensation is payable unless the tenant has, previously to the execution of the improvement, obtained the landlord's consent in writing to its execution, and that the landlord may give his consent subject to such terms as he may see fit. It has been held that permission to remove an improvement, if made, is not a consent under this section.[1] If the tenant does not agree to the landlord's terms he cannot force the landlord to consent. A consent need not be probative (s. 47).

602. *Drainage.*—The semi-permanent class of improvements includes only drainage (First Schedule, Part II.). The Act does not require the landlord's consent as a condition precedent to compensation being payable for this improvement, but it does require (s. 3) that the tenant shall give notice to the landlord, specifying the work to be done, not more than three nor less than two months before executing the drainage, and that thereupon the parties may agree upon terms of compensation, or, if the landlord prefers, he may himself undertake to do the work and, unless the tenant withdraws his notice, proceed to carry it out and recover interest on his outlay from the tenant. Notice under this section must be specific,[2] but it may be dispensed with.[3]

603. *Temporary Improvements.*—Part III. of the First Schedule of the Act contains a number of improvements, the effect of which disappears more or less rapidly. The most important of these fall under the heads of liming and manuring, laying down temporary pasture, and repairs which the tenant is not obliged to do. The tenant does not require his landlord's consent before making these improvements, and he need not give any notice to his landlord before making them (except as regards repairs—Schedule I. (29)). Moreover, it is not competent, except in the case of leases entered into before 1st January 1921 (s. 4), for parties to substitute by agreement a scale of compensation less favourable to the tenant than his rights under the Act. In the case of leases entered into before that date it was competent to agree to a substituted scale provided that this was fair and reasonable; it has been difficult in practice to shew that such a scale is not fair and reasonable,[4] and it is possibly for this reason that such substituted scales have been abolished.

604. Probably the most important of these temporary improvements is manuring, which includes (s. 49 (1)) application to the land of purchased artificial or other purchased manure, and consumption on the holding by cattle, sheep, pigs, or horses, other than work horses, of

[1] *Morse* v. *Dixon*, 1918, 87 L.J. (K.B.) 1.
[2] *Hamilton Ogilvy* v. *Elliot*, 1905, 7 F. 1115.
[3] See *Barbour* v. *M'Douall*, 1914 S.C. 844.
[4] See *Bell* v. *Graham*, 1908 S.C. 1060; *Brown* v. *Mitchell*, 1910 S.C. 369.

corn cake or other feeding-stuff not produced on the holding, or of corn produced on the holding. It is generally understood that this latter provision only applies to manurial residues which have already been put into the land, in the shape of dung, before the tenant removes, and does not apply to such residues contained in dung handed over as such to the incoming tenant. For this the outgoing tenant gets such compensation as he is entitled to by contract.[1] The Act does not lay down any definite scale of compensation for unexhausted manure beyond the provision that the outgoing tenant shall receive the value of the manure to an incoming tenant (s. 1). In practice the amount of compensation may be calculated from detailed scales, which may be found in the Transactions of the Highland and Agricultural Society and elsewhere. The Act provides (s. 1 (2) (*b*)) that in ascertaining compensation for unexhausted manures there shall be taken into account the value of the manure required by the lease or by custom to be returned to the holding in respect of any crops grown on and sold off or removed from the holding within the last two years of the tenancy.

605. The Act provides for compensation for temporary pasture sown more than two years prior to the termination of the tenancy, but only in so far as the value of such pasture at the time of quitting exceeds the value of temporary pasture on the holding which the tenant received without paying compensation at the commencement of the tenancy (Sched. I., para. (28)). This provision has caused considerable litigation. In *Mackenzie* v. *Macgillivray*[2] a tenant in laying down pasture had only complied with the rules of good husbandry, but he was held entitled to compensation on the ground that this was not the sole way in which the rules of good husbandry could have been complied with. In *Findlay* v. *Munro*[3] and *Earl of Galloway* v. *M'Clelland*[4] compensation was held not to be due on the ground that the tenant was bound by his lease to lay down the pasture ; but the tenant is now entitled (s. 1 (1)) to compensation for improvements which he was bound to make. In *Findlay* v. *Munro* opinions were divided as to whether refraining from ploughing up pasture was equivalent to laying it down.

Section 4.—Compensation to Market-Gardeners.

606. A market-garden is defined (s. 49 (1)) as a holding cultivated wholly or mainly for the purpose of the trade or business of market-gardening.[5] A market-gardener is entitled to all the rights of an ordinary tenant. He is also entitled, under s. 42, to additional rights if there is an agreement in writing that the holding shall be let or treated as a market-garden. A provision in a lease that the holding shall not be deemed to be let as a market-garden excludes this section, although

[1] See *Davidson* v. *Hunter*, 1887, 4 S.L. Rev. 33. [2] 1921 S.C. 722.
[3] 1917 S.C. 419. [4] 1915 S.C. 1062. [5] See cases cited in para. 593, *supra*.

the landlord permits the holding to be used in part as a market-garden,[1] and a consent in a lease to a tenant removing fruit-trees if he should plant them is not an agreement within the meaning of this section.[2] Such agreement may refer to part of a holding only (s. 42 (3)).[3] Somewhat different provisions apply where the lease was made before 1898 (s. 42 (2)).[4]

607. A market-gardener is entitled to compensation for the improvements contained in the Third Schedule as if they were included in Part III. of the First Schedule: *i.e.* he need neither get consent nor give notice before making these improvements (s. 42). These improvements include erection and enlargement of buildings and planting of fruit-trees and certain vegetables which continue productive for two or more years. He is also entitled to remove fruit-trees and bushes which have not been permanently set out. When a tenant desires to make market-gardening improvements and the landlord refuses to agree that the holding shall be treated as a market-garden, the tenant may apply to the Board of Agriculture, who may direct, subject to such conditions as they may think fit, that s. 42 shall apply to the whole or a part of the holding (s. 5). With regard to Schedule III. improvements, parties may agree to substitute a scale of compensation for that ordinarily payable under the Act provided the substituted compensation is fair and reasonable (s. 5 (51)).

608. The meaning of the phrase "fair and reasonable" is discussed in *Bell* v. *Graham*[5] and *Brown* v. *Mitchell*.[6] In *Bell* v. *Graham* the Court held that it was for the arbiter to decide whether the scale was fair and reasonable, and opinions were expressed that where a scale is embodied in a formal lease there is a strong presumption that it is fair and reasonable; that its fairness must be judged as at the time when it was agreed to; and that the tenant must state specifically what parts of the scale he complains of. It was observed that the arbiter's decision might be challenged by interdict or reduction: doubt was expressed as to the competency of a stated case. In *Brown* v. *Mitchell* it was held that the scale must be considered as a whole, and that, being fair as a whole, it must stand though it gave no compensation for certain kinds of manure which the tenant had applied.

Section 5.—Compensation for Disturbance.

609. Prior to 1909 a landlord had an absolute right to turn a tenant out of his holding at the end of his lease. The 1908 Act gave tenants a right to compensation for disturbance where the tenancy was terminated by the landlord without good and sufficient cause and for reasons

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[1] *Masters* v. *Duveen*, [1923] 2 K.B. 729.
[2] *Morse* v. *Dixon*, 1918, 87 L.J. (K.B.) 1.
[3] See *Taylor* v. *Steel Maitland*, 1913 S.C. 562.
[4] *Smith* v. *Callander*, 1901, 3 F. (H.L.) 28.
[5] 1908 S.C. 1060. [6] 1910 S.C. 369.

inconsistent with good estate management. Compensation was not very frequently obtained under this provision ; [1] and the 1920 Act entirely altered the nature of the tenant's right to compensation. The provisions of the latter Act regarding compensation for disturbance are repeated in s. 12 of the 1923 Act. This section applies to all holdings except certain grass parks, etc. (subs. (10)), to which the older provisions still apply.[2]

610. Sec. 12 makes compensation the rule where the tenancy is ended by notice from the landlord. In order to escape compensation he must bring himself within one of the exceptions set out in the section. It is no longer necessary for the disturbance to be "unreasonable." In general a landlord who gives notice must pay compensation unless he gives notice for one or more of the six reasons set out in s. 12 (1), *and states in the notice to remove that it is given for such reason or reasons.* The statutory reasons are (*a*) failure of the tenant to cultivate according to the rules of good husbandry, (*b*) failure when called on to remedy a remediable breach of the conditions of tenancy, (*c*) material prejudice to the landlord from an irremediable breach of such conditions, (*d*) the tenant being bankrupt or having granted a trust deed, (*e*) failure to agree to a demand by the landlord for arbitration as to future rent, and (*f*) failure to execute a lease when called on to do so.

611. The most important of these reasons is probably the first. The rules of good husbandry are defined in s. 49 (1) to include the maintenance of the land clean and in a good state of cultivation and fertility and in good condition, the execution of certain repairs to buildings, fences, etc., and, in general, such rules of good husbandry as are generally recognised as applying to holdings of the same character and in the same neighbourhood as the holding in question. It is, of course, not enough for the landlord to aver one of the above reasons : he must also prove it. If the tenant insists in a claim which the landlord repudiates the question will be referred to arbitration (see para. 618, *infra*), and it appears that the landlord will then have to satisfy the arbiter as to the validity of his reason for giving notice to the tenant. But the section provides (subs. (2)) a means whereby the landlord can at an earlier stage establish the validity of an averment that the tenant is not cultivating according to the rules of good husbandry. The landlord may at any time apply to the Board of Agriculture to grant a certificate to this effect, and the Board may then within one month grant or refuse a certificate as they think proper. Either party may then appeal to an arbiter, but, subject to any such appeal, a certificate granted by the Board is conclusive evidence that the holding is not being cultivated according to the rules of good husbandry.

612. A landlord who has given notice to remove may afterwards offer to withdraw it,[3] and he will not be liable to pay compensation if

[1] See *Brown* v. *Mitchell*, 1910 S.C. 369. [2] Sec. 13 of the 1923 Act.
[3] See *Perrett* v. *Bennett Stanford*, [1922] 2 K.B. 592.

the tenant unreasonably refuses to accept such offer. The only case when a tenant who gives notice is entitled to compensation is when (subs. (3)) he gives the notice because the landlord has refused to agree to arbitration as to the future rent. When a demand for arbitration as to rent is accepted the Act makes provision (subs. (5)) for the manner of fixing the rent. It would seem that a landlord who gives notice cannot escape paying compensation by shewing that, had he refrained from giving notice, the tenant would have left of his own free will.[1] The position when a tenant removes on an invalid notice is doubtful.[2]

613. The cases when a landlord, who has not given one of the above reasons in his notice to remove, can avoid compensation are set out in subs. (7), and include the cases when the tenant fails to give notice of his intention to claim compensation at least one month before the termination of the tenancy, when the tenant fails to give the landlord an opportunity of valuing his stock,[3] and when the tenant has died within three months before the date of the notice to quit.

614. If compensation is due the amount is (subs. (6)) a sum equal to one year's rent of the holding unless the tenant proves a loss exceeding this sum, in which case he can recover the amount of his loss up to a maximum of two years' rent. The loss must be loss or expense directly attributable to quitting the holding.[4] It has been held in England that in order to obtain compensation a tenant must prove some loss, however small it be,[5] but a tenant who sets out to prove his loss and only proves less than one year's rent is nevertheless entitled to the full year's rent.[6] Failure to realise on sale the " going concern " value of a sheep stock has been held to be a loss under this section,[7] but not loss arising from an error by the arbiter in undervaluing a way-going crop.[8] The subsection further provides that the year's " rent " means the rent after deduction of such rates, taxes, or assessments paid by the landlord as in England are a charge on occupiers, or the like whereof are not chargeable on land in England. In the normal case this appears to cover the whole of the owner's local rates : it appears not to make minister's stipend a deduction. The Board of Agriculture, on the advice of the Law Officers, withdrew a contention that stipend was a valid deduction under this section.[9] Under subs. (8) the compensation may be subject to a deduction if the tenant is also tenant of another holding.

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[1] See *Mills* v. *Rose*, [1923] W.N. 330 ; *Johnston* v. *Malcolm*, 1923, S.L.T. (Sh. Ct.) 81.

[2] See *Forbes* v. *Pratt*, 1923, S.L.T. (Sh. Ct.) 91.

[3] *Barbour* v. *M'Douall*, 1914 S.C. 844 ; *Dale* v. *Hatfield Chase Corporation*, [1922] 2 K.B. 282.

[4] See *Barbour* v. *M'Douall*, 1914 S.C. 844.

[5] *Minister of Agriculture* v. *Dean*, [1924] 1 K.B. 851.

[6] *M'Harg* v. *Speirs*, 1924 S.C. 272.

[7] *Keswick* v. *Wright*, 1924 S.C. 766.

[8] *Macgregor* v. *Board of Agriculture*, 1925 S.C. 613.

[9] *Masterton* v. *Board of Agriculture*, 2nd Div., 19th March 1924 ; cf. *Galashiels P.C.* v. *Scott Plummer*, 1923 S.C. 942.

Section 6.—Compensation for continuous Good Farming.

615. Under s. 1 a tenant can only get compensation for certain specified improvements. That compensation may not represent the full benefit which he has conferred on the holding,[1] and accordingly s. 9 provides for compensation for increase of value of the holding by continuous adoption of a standard or system of farming more beneficial than the standard or system if any required by the lease. But this section only applies in cases when a record of the condition of the holding has been made under s. 37.

Section 7.—Compensation for Damage by Game.

616. Under s. 11 of the Act provision is made for compensation to the tenant for damage by game. The tenant is entitled to kill hares, and accordingly this section does not apply to damage done by hares ; it applies to damage done by other game in all cases except where the tenant has permission in writing to kill such game.[2] The section provides for the tenant recovering the full amount of the damage done, provided the damage exceeds one shilling per acre of the area damaged, and provided that the tenant gives the landlord an opportunity to inspect the damage and makes his claim within the time provided.

Section 8.—Compensation for Deterioration of Holding.

617. The Act provides in s. 10 for compensation being payable to the landlord by the tenant on his quitting the holding if it is proved that the value of the holding has been deteriorated during the tenancy by the failure of the tenant to cultivate according to the rules of good husbandry or the terms of the lease. The landlord must before the termination of the tenancy give notice of his intention to claim under this section, but this section does not take away any common law right, and accordingly a landlord who does not give the notice required by the section may be able to make a claim under the lease.[3]

Section 9.—Procedure.

Subsection (1).—*Scope of Arbitration.*

618. The Act refers to arbitration a large variety of disputes, including most disputes which can arise regarding the rights conferred on parties by the Act. Prior to 1920 the scope of statutory arbitration was less extensive than it became under the 1920 Act. The 1923 Act re-enacts both the older provision (s. 6) and the provision of the 1920 Act (s. 15) : the former section appears to add nothing to the latter.

[1] See *Brodie Innes* v. *Brown*, 1916, 54 S.L.R. 170 ; 1917, 1 S.L.T. 49.
[2] *Thomson* v. *Earl of Galloway*, 1919 S.C. 611.
[3] *Arden* v. *Rutter*, [1923] 2 K.B. 865.

Sec. 15 draws a distinction between questions which arise before the termination and questions which arise out of or on the termination of a tenancy.[1] The only question arising during the lease which is referred to statutory arbitration, by s. 15, is a question as to the construction of the lease (s. 11 (2) also refers the question of damage by game) ; but the section refers to arbitration any question or difference arising out of any claim for compensation under the Act or for breach of contract or otherwise in respect of the holding, and any other question or difference of any kind whatsoever between the landlord and the tenant arising out of the termination of the tenancy. A dispute as to whether the tenancy has terminated does not fall within this section.[2]

Subsection (2).—*Particulars of Claim.*

619. No claim that comes within the scope of s. 15 is enforceable unless particulars of the claim have been given to the other party within two months after the termination of the tenancy (s. 15 (2)). In view of the severity of the penalty attached to failure to give particulars the Court has been somewhat lenient in construing this provision, and it is sufficient if fair notice of the nature of the claim is given to the other party.[3] There is no time limit within which an arbitration must be commenced.

Subsection (3).—*Conduct of Arbitration.*

620. The procedure in an arbitration is governed by s. 16 and the Second Schedule. The reference must be to a single arbiter, except in the case of valuations of the property of an outgoing tenant, to which s. 16 does not apply (s. 16 (5)). Parties may agree upon an arbiter, or one or both of the parties may require the Board of Agriculture to appoint an arbiter (Sched. II. (1)) from the panel which has been set up (s. 17). Should one party object to an arbitration proceeding for any reason, the Board will in general appoint an arbiter in spite of such objection,[4] but the objector may bring a suspension and interdict to prevent the arbiter proceeding.[5] The arbiter is required to make his award within twenty-eight days of his appointment, but the Board may extend this period (Sched. II. (5)). The Second Schedule makes provision for the taking of evidence by the arbiter ; for his making an award (an interim award may be made under s. 18) ; and for his dealing with expenses. The arbiter has a wide discretion in the matter of expenses.[6] When a case is stated the sheriff deals with the expenses in the Sheriff Court,[7] but the remaining expenses are dealt

[1] *Westwood* v. *Barnett*, 1925 S.C. 624.
[2] *Simpson* v. *Batey*, [1924] 2 K.B. 666 ; *R.* v. *Powell*, [1925] 1 K.B. 641.
[3] *Duke of Montrose* v. *Hart*, 1925 S.C. 160.
[4] See *Christison's Tr.* v. *Callender Brodie*, 1906, 8 F. 928.
[5] See *Donaldson's Hospital* v. *Esslemont*, 1925 S.C. 199.
[6] *Gray* v. *Lord Ashburton*, [1917] A.C. 26.
[7] *M'Quater* v. *Ferguson*, 1911 S.C. 640.

with by the arbiter.[1] Either party may ask for a stated case on a question of law ; if the arbiter refuses to state a case, the sheriff may require him to do so (Sched. II. (9)). The sheriff's decision on a stated case is subject to appeal to the Court of Session, but not to the House of Lords (s. 16 (2)). The arbiter is bound to apply the decision of the Court.[2] If an arbiter misconducts himself [3] he may be removed by the sheriff, or the sheriff may set aside his award (Sched. II. (6) (13)). Whenever the Act confers jurisdiction on the sheriff it may be exercised by the sheriff-substitute, but in that case there is no appeal to the sheriff (s. 43).

Section 10.—Miscellaneous Provisions.

Subsection (1).—*Removing for Non-payment of Rent.*

621. Sec. 25 of the Act applies to all cases where the landlord has no right of hypothec for the rent, *i.e.* to holdings of agricultural land exceeding two acres in extent,[4] and provides that when six months' rent is due and unpaid, the landlord may raise an action of removing before the sheriff for removal of the tenant at the next ensuing term. If the tenant fails to pay the arrears or to find caution for the arrears and for one year's rent further, the sheriff may decern the tenant to remove. The tenant will then have all the rights of an outgoing tenant. It is further provided that when this section applies, s. 5 of the Act of Sederunt anent Removings [5] shall not apply.

Subsection (2).—*Notice of Termination of Tenancy.*

622. Sec. 26 provides that notwithstanding the expiration of any lease the tenancy shall not come to an end unless written notice (in the form required by subs. (3) (*b*)) has been given within the period provided. The periods provided are (*a*) not less than one nor more than two years before the termination of the tenancy in the cases of (i) leases for two years and upwards, and (ii) leases renewed by tacit relocation (subs. (2)), and (*b*) not less than six months before the termination in the case of leases from year to year or for less than two years. The provisions of the Sheriff Courts (Scotland) Act, 1907, relating to removings are to have effect subject to the provisions of this section (subs. (3) (*a*)).

623. The provisions of this section may give rise to certain difficulties. It is not clear whether the section applies to a break in a lease. It is not clear whether it is possible to alter the periods of notice provided by agreement.[6] The doubt, which formerly existed, regarding

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[1] *Thomson* v. *Earl of Galloway*, 1919 S.C. 611.
[2] *Mitchell Gill* v. *Buchan*, 1921 S.C. 390.
[3] See *O'Conor* v. *Whitlaw*, 1920, 88 L.J. (K.B.) 1242.
[4] Hypothec Abolition (Scotland) Act, 1880, s. 1
[5] A.S. 14th December 1756 ; C.A.S., L, xv. 5.
[6] See *Viscountess Cowdray* v. *Ferries*, 1918 S.C. 210 ; 1919 S.C. (H.L.) 27, per Lords Johnston and Anderson ; and also opinions in *Glendinning* v. *Board of Agriculture*, 1918 S.C. (H.L.) 56.

the notice necessary to prevent tacit relocation continuing has been removed (subs. (2)). It seems clear that any notice under the section must apply to the whole holding.[1] The position when there are joint landlords or joint tenants is far from clear ;[2] one of the joint landlords or tenants may act by virtue of authority from the others, but the only safe course appears to be for notice to be given by or to all the parties affected. Where the tenant does not remove from the whole holding at the same time, it may not be clear which ish is the termination of the lease within the meaning of the section. It would seem that the first ish must be taken.[3] Other sections of the Act have been held to refer to the last ish in determining the timeousness of notices regarding compensation.[4]

623a. The section further provides (subs. (4)) that irritancies are not affected by its terms, and (subs. (5)) that it shall not apply to leases for less than a year or to stipulations in a lease entitling a landlord to resume land for building, planting, feuing, or other purposes. Accordingly, if the lease so provides, the landlord may be able to resume land without any notice.[5] A power to resume may extend to the whole holding.[6] The word " other " in this section cannot be limited by the principle of *ejusdem generis*.[7]

624. Sec. 27 provides that on the sale of a holding or part thereof held by a tenant from year to year, any then current notice to remove given by the landlord shall, if the sale is made by the person who gave the notice,[8] be null and void unless the tenant prior to the sale agrees that the notice shall be valid. The section applies even when the tenant is himself the buyer of a part of the holding.[9] It appears to be clear that the section does not apply to a notice to remove at the expiration of a lease. Whether it applies to a tenancy by tacit relocation is doubtful.

Subsection (3).—*Bequest of Lease.*

625. Sec. 28 of the Act permits a tenant to bequeath his lease to any person subject to certain conditions. The legatee must intimate the bequest to the landlord within twenty-one days of the tenant's death unless prevented by some unavoidable cause, and such intimation imports acceptance of the lease by the legatee. Within one month after this intimation the landlord may intimate to the legatee that he

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[1] *Gates* v. *Blair*, 1923 S.C. 430.

[2] See *Graham* v. *Stirling*, 1922 S.C. 90 ; *Walker* v. *Hendry*, 1925 S.N. 109.

[3] *Montgomery* v. *Wilson*, 1924, S.L.T. (Sh. Ct.) 48 ; and see *Wight* v. *Earl of Hopetoun*, 1864, 4 Macq. 729.

[4] See *Black* v. *Clay*, 1894, 21 R. (H.L.) 72 ; *Waldie* v. *Mungall*, 1896, 23 R. 792 ; *Swinburne* v. *Andrews*, [1923] 2 K.B. 483.

[5] *Kininmonth* v. *British Aluminium Co.*, 1915 S.C. 271.

[6] *Alston's Trs.* v. *Muir*, 1919, 2 S.L.T. 8.

[7] *Crichton Stuart* v. *Ogilvie*, 1914 S.C. 888.

[8] *Rochester and Chatham Joint Board* v. *Clinch*, [1925] Ch. 753.

[9] *Blay* v. *Dadswell*, [1922] 1 K.B. 632.

objects to receive him as tenant. The legatee may thereupon present a petition to the sheriff for declarator that he is tenant as from the date of death of the deceased tenant. If the landlord then establishes a reasonable ground of objection to the satisfaction of the sheriff, the sheriff will declare the bequest null and void ; otherwise he will grant the prayer of the petition. The legatee's want of skill and lack of capital has been held to be a reasonable objection.[1] The sheriff's decision is final—except, perhaps, in the case where the landlord attacks the validity of the bequest.[2] If the legatee does not become tenant the lease descends to the deceased tenant's heir. It is not clear whether parties can contract out of this section.

Subsection (4).—*Fixtures and Buildings.*

626. Sec. 29 provides that any engine, machinery, fencing, or other fixture affixed to a holding by a tenant and any building erected by him thereon shall be the property of the tenant unless (*a*) he is entitled to compensation for it under the Act or otherwise, or (*b*) it is affixed or erected in pursuance of some obligation or instead of some fixture or building belonging to the landlord. The section entitles the tenant to remove any fixture or building to which it applies before or within a reasonable time after the termination of the tenancy provided that (i) he has paid all rent due and performed all other obligations under the lease, (ii) he does no avoidable damage in the removal, and (iii) makes good all damage done by him, and (iv) he has given to the landlord one month's notice of his intention to remove the fixture or building. The landlord on receiving such notice may elect to purchase any fixture or building comprised in it. The measure of damages on the tenant improperly removing a fixture is not very clear.[3]

Subsection (5).—*Resumption of Part of Holding.*

627. When the lease contains no provision regarding resumption the landlord may, in the case of a tenancy from year to year, resume a part of the holding under the conditions and for any of the objects set out in s. 30. These objects include the erection of houses, the provision of gardens, allotments, or small holdings, the planting of trees, the opening of mines, and the making of roads. When the lease provides for resumption of part of the holding, the landlord's power to resume is not limited to a tenancy from year to year or confined to the objects above specified. Sec. 31 provides that on resumption compensation shall be payable as if the part resumed were a separate holding, and the tenant shall be entitled to a reduction of rent proportionate to the part of the

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[1] *Sloss* v. *Agnew*, 1923, S.L.T. (Sh. Ct.) 33.
[2] See *Mackenzie* v. *Cameron*, 1894, 21 R. 427.
[3] See *Harvey* v. *Mann*, 1920, 89 L.J. (K.B.) 687.

holding resumed and in respect of depreciation of the value of the remainder caused by the severance. In assessing compensation and reduction of rent the arbiter is to take into consideration any benefit or relief under the lease in respect of land resumed.

Subsection (6).—*Penal Rents and Liquidated Damages.*

628. Sec. 34 provides that notwithstanding any provision in a lease for penal rent or liquidated damages in the event of any breach by the tenant the landlord shall not be entitled to recover any sum in excess of the damage actually suffered by him in consequence of the breach. This section does not apply to conditions in a lease prohibiting the breaking of permanent pasture, the grubbing of underwoods, the cutting of trees, or regulating the burning of heather.

Subsection (7).—*Freedom of Cropping and Disposal of Produce.*

629. Sec. 35 confers on tenants full right to practise any system of cropping of arable land, and to dispose of the produce of the holding. This section does not apply to land let for market-gardening,[1] but it may entitle a tenant of arable land to use it for market-gardening.[2] This freedom is conferred subject to the restrictions (*a*) that the tenant shall make adequate provision to protect the holding from deterioration and return to the land the full equivalent manurial value of all crops sold off the holding in contravention of the lease or of the custom of the country, and (*b*) that if the tenant exercises his rights so as to injure or be likely to injure the holding the landlord may at any time recover damages or obtain an interdict.[3]

630. The rights conferred on the tenant by the section do not apply (*a*) in the case of a tenancy from year to year as respects the year before the tenant quits the holding or any period after he has given or received notice to quit which results in his quitting the holding; and (*b*) in any other case as respects the year before the expiration of the lease. The tenant is prohibited from selling produce off the holding during the last year in contravention of his lease, even although the produce was grown before the commencement of the last year.[4]

631. Sec. 36 further restricts the tenant's rights after notice to terminate the tenancy has been given; it provides that the tenant shall not thereafter, unless by agreement, sell or remove from the holding any manure, or any hay or straw, or roots grown in the last year of the tenancy until he has given the landlord or incoming tenant an opportunity of purchasing them at fair market value or such other value as is provided by the lease.

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[1] *Taylor* v. *Steel Maitland*, 1913 S.C. 562.
[2] *Meux* v. *Cobley*, [1892] 2 Ch. 253.
[3] See *Westwood* v. *Barnett*, 1925 S.C. 624.
[4] *Meggeson* v. *Groves*, [1917] 1 Ch. 158.

SUBSECTION (8).—*Parties under Disability and Limited Owners.*

632. When a party is under disability the sheriff may appoint a tutor or curator for the purposes of the Act (s. 38). When a landlord is not absolute owner of the holding, any agreement made or consent given by him under the Act is valid as if he were absolute owner (s. 39) ; but he may be able to charge compensation paid by him on the holding (ss. 21 to 24)). Special provision is made for Crown lands (s. 40), and ecclesiastical and charity lands (s. 41).

SUBSECTION (9).—*Change of Landlord or Tenant.*

633. The definitions of landlord and tenant (s. 49 (1)) cover successors of the original landlord or tenant. Sec. 19 provides for the ownership of the holding becoming divided. The short amending Act of 1923 [1] provides for a new subsection being inserted in the principal Act (s. 49 (5)) to make valid any notice served by a tenant on a landlord in ignorance of the fact that the property has passed to a new landlord. Sec. 49 (3) provides that the designations of landlord and tenant shall continue to apply to the parties until the conclusion of any proceedings under the Act.[2] A landlord who does not obtain entry until after the tenant has removed from the holding incurs no liability to the tenant.[3]

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[1] 13 & 14 Geo. V. c. 25.
[2] See *Dale* v. *Hatfield Chase Corporation*, [1922] 2 K.B. 282.
[3] *Waddell* v. *Howat*, 1925 S.C. 484 ; *Tombs* v. *Turvey*, 1924, 93 L.J. (K.B.) 785.

AIR.

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Section 1.—Common Law.

634. In Scotland the rule of law is that the owner of land, where there is no division of the surface and the underground estate, holds the property of everything within his boundaries *a cœlo usque ad centrum*, or, as Craig has it, *inter cœlum et inferos*.[1] Logically it would follow that everyone who flies over another's land commits a trespass. The vertical measurement of land property is indefinite—it knows no limits.[2] In England the parallel maxim is *cujus est solum ejus est usque ad cœlum*.[3] But as long ago as 1815 Lord Ellenborough expressed a doubt as to the liability of an aeronaut to an action of trespass at the suit of the occupier of every field over which his balloon passes in the course of his voyage.[4] In *Kenyon* v. *Hart*,[5] Blackburn J. said he understood the good sense of that doubt, though not the legal reason for it.

Section 2.—Air Navigation Act, 1920.

635. Any doubt which there may have been as to the position of aeronauts whether in Scotland or England, with regard to the law of trespass or of nuisance, was finally set at rest by s. 9 of the Air Navigation Act, 1920,[6] which enacted that "(1) no action shall lie in respect of trespass or in respect of nuisance, by reason only of the flight of aircraft over any property at a height above the ground, which, having regard to wind, weather, and all the circumstances of the case is reasonable, or the ordinary incidents of such flight, so long as the provisions of this Act and any order made thereunder, and of the Convention,[7] are duly complied with; but where material damage or loss is caused by an aircraft in flight, taking off, or landing, or by any person in any such aircraft, or

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[1] Craig, i. 15, 16, *tot. tit.*, ii, 8, 14; Stair, ii. 1, 5; Ersk. ii. 1, 6 *et seq.*; Bankton, i. 3, 20; Bell's Prin., s. 638 *et seq.*

[2] *Glasgow City Railway Co.* v. *MacBrayne*, 1883, 10 R. 894, at 902.

[3] Broom's Legal Maxims, 9th ed., p. 260.

[4] *Pickering* v. *Rudd*, 1815, 4 Camp. 219, at 220.

[5] 1865, 6 B. & S. 249, at 252.

[6] 10 & 11 Geo. V. c. 80.

[7] The Paris Convention of 1919, see Parliamentary Papers, 1919 [Cmd. 266].

by any article falling from any such aircraft, to any person or property on land or water, damages shall be recoverable from the owner of the aircraft in respect of such damage or loss, without proof of negligence or intention or other cause of action, as though the same had been caused by his wilful act, neglect or default, except where the damage or loss was caused by or contributed to by the negligence of the person by whom the same was suffered :

" Provided that, where any damages recovered from or paid by the owner of an aircraft under this section arose from damage or loss caused solely by the wrongful or negligent action or omission of any person other than the owner or some person in his employment, the owner shall be entitled to recover from that person the amount of such damages, and in any such proceedings against the owner the owner may, on making such application to the Court and on giving such undertaking in costs as may be prescribed by rules of Court, join any such person as aforesaid as a defendant ; but where such person is not so joined he shall not in any subsequent proceedings taken against him by the owner be precluded from disputing the reasonableness of any damages recovered from or paid by the owner.

" (2) Where any aircraft has been *bona fide* demised, let, or hired out for a period exceeding fourteen days to any other person by the owner thereof, and no pilot, commander, navigator, or operative member of the crew of the aircraft is in the employment of the owner, this section shall have effect as though for references to the owner there were substituted references to the person to whom the aircraft has been so demised, let, or hired out."

636. This section may be called the Charter of the Air, but the licence to use the air for purposes of passage is accompanied by important responsibilities. In the first place, the owners of aircraft are absolutely liable for all damage caused by flight and its incidents. In the second place, that responsibility to the person or owner of property which has been damaged remains, even although the damage has been caused solely by the negligence of a third party, *e.g.* the pilot of another aircraft whose wrongful manœuvres caused an aircraft to fall out of control and do damage. In such a case the owner of the aircraft which did the damage must recompense the party injured, but has a right of relief against the owner of the aircraft which alone was negligent. And it would seem that similar liability would attach to the owner, if his aircraft were flown by another without his knowledge or consent, with a similar right of relief against the wrongdoer. In the third place, the owner of an aircraft who has completely parted with the possession and control of it for a period of fourteen days or less remains liable for any damage caused by its use to parties injured thereby, but has a right of relief against the party under whose control the aircraft was when the damage was done, if the damage was caused solely by the negligence of such party. But if such owner has completely parted with such possession and control for a period exceeding fourteen days and no employee of his

is an operative member of the crew of the aircraft doing damage, the owner's responsibility under the Act is transferred to the person to whom he has ceded such possession and control.

Section 3.—Regulation of Use of Aircraft.

637. It is not within the scope of this title to set forth at length the statutory provisions which regulate in detail the use of aircraft. Shortly put, the history and effect of these statutes is as follows :—

Subsection (1).—*The Air Council.*

638. By the new Ministries and Secretaries Act, 1916,[1] an Air Board was established for organising and maintaining the supply of aircraft during the European War. By the Air Force (Consolidation) Act, 1917,[2] the Air Council was established in place of the Air Board. It may sue and be sued by that name (s. 10).

Subsection (2).—*Navigation of Aircraft.*

639. The Paris Convention of 1919 set up a code of uniform rules for international air navigation, including such matters as marking of aircraft, keeping of log books, lights and signals, rules for preventing collisions in the air, customs, etc. The Air Navigation Act, 1920,[3] was passed for the purpose of making provision for controlling and regulating the navigation of aircraft, and giving effect to the Paris Convention.[4] Part I. provides for the making of Orders in Council for the purposes of the preamble. The purposes for which these Orders may be made are more particularly specified. Part II. provides that the purposes of the Air Council established under the Air Force (Constitution) Act, 1917, shall extend so as to include all matters connected with air navigation (s. 6). Special powers are conferred upon the Secretary of State in time of war or great national emergency (s. 7). Provision is made for the establishment of aerodromes by the Air Council and local authorities and for the acquisition of land therefor (s. 8). Penalties are provided for dangerous flying (s. 10). The laws relating to wreck and salvage, including reward for salvage services, now apply to aircraft on or over the sea or tidal waters (s. 11). The Secretary of State may make regulations providing for the investigation of accidents to aircraft and for purposes incidental thereto (s. 12). Foreign aircraft, any part of which is alleged to infringe a patent entitled to protection in the British Isles, may be detained until deposit is made or security found in respect of the alleged infringement (s. 13).

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[1] 6 & 7 Geo. V. c. 68, ss. 7 and 8.
[2] 7 & 8 Geo. V. c. 51.
[3] 10 & 11 Geo. V. c. 80.
[4] *Vide* the preamble.

Section 14 deals with the jurisdiction of the Courts to try offences or proceedings under the Act.

SUBSECTION (3).—*Orders in Council.*

640. The following Orders in Council have been made in exercise of the powers conferred by the Air Navigation Act, 1920, and are still in force :—

(1) The Air Navigation (Consolidation) Order, 1923.[1] That Order constitutes a code of rules governing the use of aircraft, their navigation, and incidental matters.

(2) The Air Navigation (Colonies and Protectorates) Order in Council, 1922,[2] extending the application of certain sections of the Act of 1920 to certain of the colonies.

(3) The Air Navigation (Investigation of Accidents) Regulations, 1922.[3]

(4) Order in Council, dated 10th August 1921,[4] specifying certain sections of the Merchant Shipping Acts as to Wreck and Salvage which shall apply to Air Navigation, and giving jurisdiction in such matters to all Courts having Admiralty jurisdiction (see ADMIRALTY).

641. For the use of aircraft in war and the International Law relating thereto, reference must be made to the text-books on International Law.[5]

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[1] 19th December 1923, S.R. & O., 1923 (No. 1508), p. 13.
[2] 6th February 1922, S.R. & O., 1922 (No. 121), p. 57.
[3] 28th June 1922, S.R. & O., 1922 (No. 650), p. 51.
[4] S.R. & O., 1921 (No. 1286), p. 32.
[5] See also Air Power and War Rights, by J. M. Spaight, 1st ed., 1924.

ALIENS.

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Section 1.—Introductory.

Subsection (1).—*Statutory Provisions.*

642. The common laws of both Scotland and England with regard to aliens have been almost entirely superseded by statutory provisions, particularly with regard to persons born after 1st January 1915. The following are now the governing Acts, and they will be referred to in the following sections by the abbreviations indicated in parentheses :—

The Aliens Restriction Act, 1914 [1] (1914 Restriction Act).
The British Nationality and Status of Aliens Act, 1914 [2] (1914 Act).
The British Nationality and Status of Aliens Act, 1918 [3] (1918 Act).
The Aliens Restriction (Amendment) Act, 1919 [4] (1919 Act).
The British Nationality and Status of Aliens Act, 1922 [5] (1922 Act).

General Authorities.—Bankton, I. ii. 61–5; Erskine, iii. 10, 10; Bell's Com. i. 323–6, Prin. 43, 2129–37; Henriques, Law of Aliens (1906); M'Nair, Legal Effects of War (1920), and in (Eng.) Encyclopædia of Forms and Precedents (1925), vol. ii. pp. 7–17.

[1] 4 & 5 Geo. V. c. 12.
[2] 4 & 5 Geo. V. c. 17.
[3] 8 & 9 Geo. V. c. 38.
[4] 9 & 10 Geo. V. c. 92.
[5] 12 & 13 Geo. V. c. 44.

The following statutes, though now repealed, will also be referred to :—

The Naturalisation Act, 1870 [1] (1870 Act).
The Aliens Act, 1905 [2] (1905 Act).

Subsection (2).—*Definition.*

643. At common law aliens are "those who are born out of the kingdom, and are subject to the dominion of a foreign prince." [3] Certain statutes of the beginning of the eighteenth century render it necessary to add "of parents who are not themselves natural-born subjects." [4] In England an alien has been defined as "a subject of a foreign state, who has not been born within the allegiance of the Crown of this kingdom." [5] Owing to the increased complexity of the law and to the numerous statutory provisions set forth above, the only definition which may now be relied upon is the negative one propounded by Professor Dicey, namely, "any person who is not a British subject." [6] This description has been adopted in recent statutes (1914 Act, s. 27). A British subject may be defined shortly as a person "who owes permanent allegiance to the Crown." [7] Under the old law the test seems to have been territorial allegiance at birth, but in recent years less importance has been attached to origin, though it is still the primary element.

644. Although it may be clear that a particular person is not a British subject it may sometimes be impossible to ascribe any particular foreign nationality to him.[8] Former German nationals, however, have great difficulty in escaping from their original status, owing to the provisions of the Delbrück law of 1913. By s. 8 of that law such persons are allowed special facilities for the recovery of German nationality. Those who have forfeited this status by absence,[9] or by actual discharge,[10] and have become naturalised in Britain, will, if their naturalisation certificate is revoked, be treated as Germans, whereas if they had been formerly subjects of any other State they would be of no nationality. Further, by s. 25 a German may retain his original status even after naturalisation in Britain.[11]

Subsection (3).—*Classification.*

645. Aliens may be divided into (*a*) naturalised aliens (more properly termed naturalised British subjects) ; (*b*) friendly aliens ; (*c*) former

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[1] 33 & 34 Vict. c. 14. [2] 5 Edw. VII. c. 13. [3] Erskine, iii. 10, 10.
[4] Bell, Prin. 2134 ; 7 Anne, c. 5 ; 4 Geo. II. c. 21, s. 1.
[5] Burke, 1868, 11 Cox C.C. 138. [6] Conflict of Laws, 164.
[7] Dicey, *ibid.* ; *vide infra*, para. 694.
[8] *Stoeck* v. *Public Trustee*, [1921] 2 Ch. 67 ; see also *Hahn* v. *Public Trustee*, 1925, 41 T.L.R. 586, and M'Nair, Legal Effects of War, 8.
[9] *Ex parte Weber*, [1916] 1 A.C. 421.
[10] *Ex parte Liebmann*, [1916] 1 K.B. 268. [11] See M'Nair, 14–16.

alien enemies; (*d*) present alien enemies; and (*e*) denizens. Each of these classes will be dealt with in its turn.

Section 2.—Acquisition of Alien Status.

Subsection (1).—*Modes of Acquisition.*

646. A person may become an alien in many different ways:—(1) By birth; (2) by separation of Crowns or territory; (3) by choice, (*a*) by naturalisation abroad, or (*b*) by declaration of alienage; (4) by denaturalisation in Britain; (5) by loss of inherited nationality; (6) (*a*) by presumption, and (*b*) by declaration by Executive; (7) in the case of women, (*a*) by marriage, (*b*) by naturalisation of husband, (*c*) by direction of the Home Secretary, and (*d*) by declaration of alienage; and (8) in the case of children in minority (*a*) by forfeiture of British nationality by a parent, and (*b*) by declaration of alienage. The circumstances in which each of these methods of acquiring alien status is competent are explained in the following subsections. Various forms of declaration, etc., are prescribed by regulations made under the 1914 Act (ss. 19 and 24),[1] and under former Acts (which regulations are continued in force by s. 19 (3) of the 1914 Act). With regard to evidence and penalties, reference may be made to ss. 20–23. Loss of British status does not absolve from liability already incurred in that capacity.[2]

Subsection (2).—*Birth.*

647. At common law everyone born outwith the British Dominions is *ipso facto* an alien, it being a natural presumption in early times that he did not owe allegiance to the British Crown. This presumption clearly did not apply in certain cases, and aided by the fiction of exterritoriality two well-known exceptions came to be allowed. These were (*a*) children of British ambassadors,[3] (but not merely of soldiers in the service of the Crown,[4]) and (*b*) persons born on British ships,[5] whether in foreign territorial waters or not.[6] Such persons were British subjects. Numerous further exceptions have been introduced by statute,[7] but apart from them all foreign-born persons are still aliens. Persons born on foreign vessels are foreign subjects, and, with regard at any rate to those born on or after 1st January 1915, this applies *ceteris paribus* in British territorial waters (1914 Act, s. 1 (2)).

648. When a sovereign of one country succeeds to the throne of another, those of his former subjects who were born before the union of

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[1] See, *e.g.*, S.R. & O., 1914 (No. 1861), i. 238; 1916 (No. 120), i. 52; 1918 (No. 1488), i. 89; 1919 (No. 1552), i. 66; 1920 (No. 1864), i. 162; 1921 (No. 528), 34; 1922 (No. 447), 61; 1922 (No. 675), 63.

[2] 1914 Act, s. 16; *Vecht* v. *Taylor*, 1917, 116 L.T. 446.

[3] *Calvin's* case, 1608, 7 Rep. 1.

[4] *De Geer* v. *Stone*, 1882, 22 Ch. D. 243.

[5] *Marshall* v. *Murgatroyd*, 1870, 6 Q.B. 31.

[6] Henriques, Law of Aliens, 65.

[7] *Vide infra*, paras 699–708.

the Crowns—the *ante-nati*—are aliens in the country to which he succeeds. Thus Scots born prior to 1603 remained aliens in England.[1] When a cession of territory takes place, persons born in the ceded portion after the separation are aliens by birth. It has been held that the important date in this connection is that of recognition and not of declaration of independence; that is, in the case of the American Colonies, 1783, not 1776.[2]

Subsection (3).—*Separation of Crowns or Territory.*

649. On a separation of Crowns the *post-nati*, who became subjects of the new country by birth under the rule of *Calvin's* case, cease to be such. Thus Hanoverians born after 1714 became, on the accession of Queen Victoria, subjects of the Duke of Cumberland, and so aliens in Britain.[3] Separation of territory operates a change in the nationality of the inhabitants of the separated portion.[4] "A relinquishment of the government of a territory is a relinquishment of authority over the inhabitants of that territory."[5] The older authorities in Scotland took the contrary view, namely, that persons born in the American Colonies while they formed a part of the British Empire always remained British subjects.[6] All these cases were discarded by the Court, after consultation, in favour of the English principle.[7] It is probable, however, that separation does not have this effect until recognised by the old country.[8] Those who emigrate to the new country after the date of cession, of course retain their former nationality.[9] In order that the matter may be free from doubt it is always now regulated by treaty.[10] The usual provision is that persons who continue to reside in the new country after a certain date become aliens in the old.

Subsection (4).—*Choice.*

650. At common law British nationality is imposed, and not merely offered for acceptance. The allegiance to the Crown implied in it is indelible, for *nemo potest exuere patriam* is a maxim of British law.[11] Except by virtue of recent legislation, therefore, voluntary expatriation on the part of natural-born British subjects is impossible. (*a*) By s. 13

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[1] *Calvin's* case, *supra.*

[2] *Nisbett* v. *Nisbett's Trs.*, 1834, 12 S. 293; but see *Dundas, infra.*

[3] *Isaacson* v. *Durant*, 1886, L.R. 17 Q.B.D. 54.

[4] *Doe d. Thomas* v. *Acklam*, 1824, 2 St. Tr. (N.S.) 105; *Dundas* v. *Dundas*, 1839, 2 D. 31.

[5] *Thomas, supra*, at 121.

[6] *Stewart* v. *Hoome*, 1792, M. 4649; *Trail* v. *Aitken*, 1808, refd. to, 2 D. 51; *Brown* v. *Gordon*, 1810, 2 D. 36 n.; *Nisbett, supra.*

[7] *Dundas, supra.*

[8] *Nisbett, supra.*

[9] *Stewart*, 1857, 19 D. 430.

[10] *E.g.* with regard to Heligoland by 53 & 54 Vict. c. 32, and as to Alsace-Lorraine by the Treaty of Peace, 1919, arts. 53, 54, 79, and annexa.

[11] *Æneas Macdonald's* case, 1747, 18 St. Tr. 857.

of the 1914 Act (replacing s. 6 of the 1870 Act) any natural-born British subject who voluntarily becomes naturalised in a foreign country ceases *ipso facto* to be a British subject. In spite of the apparently general terms of these clauses the Courts have held that naturalisation in enemy countries in time of war is treason,[1] and that similar action in a neutral country will not avoid liability to military service in Britain.[2] (*b*) The same result may also be achieved under s. 15 of the 1914 Act (replacing s. 3 of the 1870 Act) by making a declaration of alienage when a convention has been entered into by His Majesty with some other State for that express purpose. The only convention as yet concluded is with the United States.[3] (*c*) Any natural-born British subject who is, or becomes during minority, also a subject of another state may divest himself of British nationality (if of full age and not under disability) by declaration under s. 14 (1) of the 1914 Act. But until he makes such a declaration he is subject to all the liabilities of a British citizen.[4] (*d*) Where children's names have been included in a parent's British naturalisation certificate,[5] they may resume their former nationality by declaration to be made within twelve months of attaining majority (s. 5 (1)).

Subsection (5).—*Denaturalisation.*

651. Since the Act of 1914 it has been possible for a naturalised alien to be deprived of his status. By s. 1 of the 1918 Act (amending s. 7 of the 1914 Act) it is provided that the Home Secretary shall revoke a certificate of naturalisation on the grounds (*a*) that it was obtained by false representations or fraud, or (*b*) that it was obtained by concealment of material circumstances, or (*c*) of disaffection or disloyalty to the Crown. In the following cases also he shall revoke the certificate if satisfied that its continuance is not conducive to the public good : (*d*) trading with the enemy during the late war ; (*e*) sentence within five years to twelve months' imprisonment, penal servitude, or a fine of £100 ; (*f*) bad character at the time of grant ; (*g*) residence abroad for seven years without maintaining "substantial connection" with His Majesty's Dominions, unless representing British interests, commercial or otherwise ; and (*h*) being also a subject of another state at war with Great Britain.[6] Before revoking the certificate the Home Secretary may always, and in cases (*a*), (*b*), (*c*), (*d*), (*f*), and (*h*), if the naturalised person demands it, must, institute an inquiry into the circumstances (s. 7 (3) and (4)). It appears, however, that he is not bound to follow any recommendation which may be made by the appointed tribunal. Revocation takes effect from whatever date may be fixed by the Home

[1] *Lynch's* case, [1903] 1 K.B. 444 ; *Freyberger's* case, [1917] 2 K.B. 129.
[2] *Gschwind* v. *Huntington*, [1918] 2 K.B. 420.
[3] Naturalisation Act, 1872 (35 & 36 Vict. c. 39), s. 2.
[4] *Sawyer* v. *Kropp*, 1916, 85 L.J. (K.B.) 1446.
[5] *Vide infra*, para. 708.
[6] *E.g.* under Delbrück law, s. 25, *vide supra* para. 644.

Secretary, and the certificate must then be surrendered (s. 7 (6)). "The former holder is to be regarded as an alien and as a subject of the State" (if any [1]) "to which he belonged at the time the certificate was granted" (s. 7A (3) of 1914 Act, as amended by 1918 Act, s. 1). As to revocation of Imperial certificates granted in the Dominions, see s. 7 (5), and of those granted to alien enemies, 1918 Act, s. 1.

Subsection (6).—*Loss of Inherited Nationality.*

652. Any person who acquires British nationality by inheritance [2] may (if of full age and not under disability) divest himself of it by declaration of alienage (1914 Act, s. 14 (2)). Further, there is a certain class of persons whose inherited nationality is dependent on registration of birth at a British Consulate.[3] Such persons cease to be British subjects within one year (or longer period in special cases) of attaining majority, unless they make a declaration of retention of nationality, and, where the laws of any other country of which they are subjects or citizens require it, a declaration of alienage in that country (1918 Act, s. 1 (2), amending 1914 Act, s. 1 (1)).

Subsection (7).—*Presumption.*

653. (*a*) Under s. 1 (4) of the 1914 Restriction Act any person charged with an offence under that Act is deemed to be an alien until he disproves it [4]—a provision almost without parallel in British criminal law. (*b*) Further, the Executive seems to be empowered in cases of doubt to ascribe any nationality to any person (1919 Act, s. 2 (1)). In questions under the Treaty of Peace with Austria the decision of the Administrator is final.[5]

Subsection (8).—*Marriage, etc.*

654. At common law, marriage has no effect upon the nationality of women. A woman who was a British subject did not cease to be so by marriage with an alien. This has been altered by legislation culminating in the 1914 Act. Sec. 10 provides that a wife shall be deemed to be of the same nationality as her husband. This covers two cases: (*a*) where a British woman marries an alien; [6] and (*b*) where a British husband becomes naturalised abroad. By s. 11 a widow or *divorcée* retains the nationality so acquired until she takes the necessary steps to alter it.

655. Sec. 7A of the 1914 Act (as amended by s. 1 of the 1918 Act) deals with the methods by which the wife of a man who has forfeited his British status may also become an alien though she is still primarily

[1] *Vide supra*, para. 644.
[2] *Vide infra*, paras. 699–700.
[3] *Vide infra*, para. 700.
[4] *R.* v. *Kakelo*, [1923] 2 K.B. 793.
[5] *Vide infra*, para. 677.
[6] *Fasbender* v. *Att.-Gen.*, [1922] 2 Ch. 850.

a British subject. This is brought about (*c*) by direction of the Home Secretary (subject to certain restrictions in the case of British-born women), or (*d*) by declaration of alienage to be made within six months. Unless the husband's certificate has been revoked there seems to be no means whereby an alien woman who has acquired British nationality through him may be deprived of her status.[1]

Subsection (9).—*Forfeiture of Parent's British Nationality, etc.*

656. The 1914 Act makes special provision for the case of minor children also. There are two special ways in which they may become aliens. As a general rule where a parent forfeits his British status, his children follow him into alienage, provided that they become naturalised according to the law of their new country (s. 12 (1)). Exceptions have been made, however, in favour of children of widows who lose their status by remarriage (*ib.*), and of children whose parent becomes an alien by the revocation of his naturalisation certificate (s. 7A (1) and (2) added by 1918 Act, s. 1). In these cases they remain British. In the latter case, however, their mother may make a declaration of alienage on her and their behalf (*ib.*).

Section 3.—Naturalised Aliens.

657. Naturalisation is defined by Erskine as "a right granted to a stranger or alien by the authority of Parliament, in virtue of which he acquires the same privileges as if he had been born in the kingdom"[2] The 1914 Act provides that, subject to the provisions therein contained, an alien of this class "shall be entitled to all political and other rights, powers, and privileges, and be subject to all obligations, duties, and liabilities to which a natural-born British subject is entitled or subject, and, as from the date of his naturalisation, have to all intents and purposes the status of a natural-born British subject" (s. 3 (1)). There appear to be now no special disabilities attaching to the status of a naturalised alien, who is therefore more appropriately termed "a naturalised British subject." The restrictions imposed by the Act of Settlement with regard to certain offices in England have been removed by s. 3 (2) of the 1914 Act.[3] It has been held in England that a naturalised alien is subject to the Restriction Acts.[4] This decision, it is submitted, is unsound, and would not be followed in Scotland. Certain temporary restrictions were incidentally imposed on naturalised aliens during the late war by the Defence of the Realm Acts, which have now expired.[5] Thus all those of German origin were subject to internment.[6]

[1] See M'Nair, Legal Effects of War, 13.
[2] Ersk. iii. 10, 10.
[3] *Rex* v. *Speyer*, [1916] 2 K.B. 858.
[4] *Agdeshman* v. *Hunt*, 1917, 86 L.J. (K.B.) 1334.
[5] See 5 & 6 Geo. V. c. 8, s. 1; 8 & 9 Geo. V. c. 59; S.R. & O., 1921 (No. 1276), 1348.
[6] Reg. 14B; *Rex* v. *Halliday*, [1917] A.C. 260; as to change of name, see Reg. 14H and *Ernest* v. *Metropolitan Police Commissioner*, 1919, 89 L.J. (K.B.) 42.

658. The validity of a marriage contracted in Britain by a naturalised alien is determined solely by British law.[1]

659. Naturalisation takes effect as from the date of the certificate (1914 Act, s. 3 (1), and 1870 Act, s. 15). Under former statutes it was held to be retrospective to birth,[2] unless this implication was excluded by the express terms of the grant.[3]

Section 4.—Friendly Aliens.

Subsection (1).—*Rights.*

660. Friendly aliens have all the rights which are enjoyed by British subjects with the exceptions detailed below. They have free access to the British Courts, and are not bound *qua* aliens and apart from residence abroad to sist a mandatary.[4] In early times foreigners were allowed to take advantage of the Scottish practice of arrestment to found jurisdiction against their own nationals,[5] but according to a recent decision it seems that such a course is no longer open to them. Even in a commercial cause a plea of *forum non conveniens* will be sustained.[6] They are entitled to poor relief,[7] to National Health Insurance benefits,[8] and to Widows and Old Age Pensions,[9] on the same footing as if they were British subjects. There seems to be no provision as to the application of Unemployment Insurance to aliens. They have now no special rights attaching to their status. In Scotland they never enjoyed the privilege of being tried by a jury *de medietate linguæ*,[10] and in England this was abolished in 1870.[11]

Subsection (2).—*Disabilities as to Public Rights.*

661. From a practical point of view an alien has no rights against the Crown, except that of recourse to the Courts. In the event of ill treatment, however, it seems that his own country may intervene on his behalf.[12] The various disabilities which now affect aliens in questions of public rights are mainly due to recent legislation. Prior to 1905 their position was very different.

662. An alien has no right even at common law to demand entrance to the kingdom.[13] Various statutes have been passed from time to

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[1] *Mette* v. *Mette*, 1859, 1 Sw. & Tr. 416.

[2] *Goldston* v. *Young*, 1868, 7 M. 188, at 190, under 7 & 8 Vict. c. 66.

[3] *Fish* v. *Klein*, 1817, 2 Merivale 431.

[4] Maclaren, Court of Session Practice, 436.

[5] *Elvies* v. *Vernor*, 1610, M. 4833.

[6] *Société du Gaz de Paris* v. *Société Anonyme de Navigation* "*Les Armateurs Français*," 1926, S.L.T. (H.L.) 33.

[7] *Robertson* v. *Dempster*, 1889, 17 R. 272; Graham on Poor Law, 267.

[8] National Health Insurance Act, 1924 (14 & 15 Geo. V. c. 38), s. 109.

[9] Widows, etc., Contributory Pensions Act, 1925 (15 & 16 Geo. V. c. 70), ss. 23 (2) and 40; cp. Old Age Pensions Acts, 1908, s. 2, 1911, s. 3, and 1919, s. 2 (2) and (3).

[10] *Itansen*, 1858, 3 Irv. 3.

[11] 1870 Act, s. 5; see also 1914 Act, s. 18.

[12] *Don Pacifico's* case, 1850, Pitt-Cobbett, L. Cas. Int. Law, i. 209.

[13] *Musgrave* v. *Chung Teeong Toy*, [1891] A.C. 272; *Poll* v. *Lord Advocate*, 1897, 1 F. 823, per Lord Kyllachy at 829; see also *Att.-Gen. for Canada* v. *Cain*, [1906] A.C. 542.

time to declare and extend the powers enjoyed by the Executive at common law, particularly at the time of the French Revolution.[1] Among the most important of these was the Aliens Act, 1905,[2] which was repealed by the 1919 Act (s. 16 (2)) as at a date afterwards fixed as 12th October 1920,[3] subject to the provision that orders may be made under the 1914 Restriction Act to incorporate and modify any of the provisions of the 1905 Act. The effect of this legislation is to continue the restrictions of the 1905 Act indefinitely. In addition to these powers the Crown has a complete right of exclusion in virtue of s. 1 (1) (*a*) of the 1914 Restriction Act, as amended by s. 1 (1) of the 1919 Act, which amendment, and the Orders in Council made under it,[4] has been continued in force from year to year by the Expiring Laws Continuance Acts.[5] The principal exercise of these latter powers will be found in the Aliens Restriction (Consolidation) Order, 1914.[6]

663. Aliens who have gained admittance to the realm are liable to be expelled. The position at common law is discussed in *Leslie* v. *Forbes*.[7] In recent times the matter has been regulated by statute. The 1905 Act, as shewn above, has been virtually maintained though nominally repealed, and the 1914 Restriction Act also contains provisions for deportation.[8] Various orders have been made under these statutes, such as the Aliens Restriction (Consolidation) Order, 1916 (art. 12),[9] the Aliens Order, 1919 (art. 12),[10] the Aliens Order, 1920 (art. 12),[11] and an amending order in 1923 relating to the Irish Free State.[12] Further regulations may be made under the 1920 Order.[13] The Home Secretary has an absolute discretion with regard to deportation under the last-mentioned Order, and a writ of *habeas corpus* will not be granted in England.[14] As to procedure in Scotland (which never seems to have been required during the war), see Act of Adjournal of 21st July 1920.[15]

664. If an alien is permitted to reside in this country he may be arrested, detained and searched, and subjected to restrictions with regard to "any other matters which appear necessary or expedient with

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[1] Bell, Prin. 2134; see W. F. Craies in Law Quarterly Review, 1890, vi. 27.
[2] 5 Edw. VII. c. 13. [3] S.R. & O., 1920 (No. 448), i. 153.
[4] *Ex parte Sugarman*, 1922, 127 L.T. 27.
[5] See 15 & 16 Geo. V. c. 76.
[6] S.R. & O., 1914 (No. 1374), i. 6, consolidating four prior Orders (art. 34 (3)); for which see Manual of Emergency Legislation, 48–67; for subsequent Orders see para. 663.
[7] 1749, M. 4636, at 4637 and 4642; for English, etc., law, see Henriques, 9–11; J. de Droit Int. Privé, 1889, xvi. 357.
[8] Sec. 1 (1) (as amended by 1919 Act, s. 1 (1)).
[9] *Ex parte Duke of Chateau Thierry*, [1917] 1 K.B. 922; *ex parte Sacksteder*, [1918] 1 K.B. 578.
[10] *Rex* v. *Inspector of Leman Street Police Station*, 1920, 36 T.L.R. 677.
[11] S.R. & O. (No. 448), i. 138; *Ex parte Bloom*, 1920, 90 L.J. (K.B.) 574.
[12] S.R. & O. (No. 326), 57.
[13] See S.R. & O., 1920 (Nos. 488 and 801), i. 155 and 158.
[14] *Ex parte Bressler*, 1924, 131 L.T. 386.
[15] Also printed in S.R. & O., 1922 (No. 543), 500.

a view to the safety of the realm" (1914 Restriction Act, s. 1 (2) (*i*) and (*k*)). There is, however, no express power to intern, and in one case in which an enemy alien had been interned the Crown relied solely on the Royal Prerogative with regard to enemies.[1] Any pre-existing powers are, however, reserved by the 1914 Act (s. 1 (6)). Internment was, of course, authorised during the late war by the D.O.R.A. Regulations (see 14B). This temporary legislation expired on 31st August 1921.[2] Aliens are further subject to restrictions with regard to registration, change of residence, and departure from the kingdom.[3]

665. A non-resident alien is not entitled to challenge in the British Courts the executive acts of the Crown on the ground of tort.[4] It used to be considered in Scotland that even a resident alien was subject to the same disability, but an opinion of Lord Kyllachy's to that effect [5] has been disapproved in the House of Lords.[6]

666. The public rights of franchise and office are denied to aliens.[7] No alien may enter the civil service (1919 Act, s. 6). If objection is taken, an alien may not serve as a member of a jury (*ib.* s. 8). Formerly the Courts in Scotland were reluctant to enforce attendance upon aliens, but they refused to decide that they were disqualified.[8] It would seem to be implied in the statute that they are not now debarred from serving. Even alien enemies are admissible as witnesses in criminal matters.[9] It is a criminal offence for an alien to foment industrial disputes, and special penalties are provided if he attempts to stir up sedition (1919 Act, s. 3).

Subsection (3).—*Disabilities as to Private Rights.*

667. No alien may own a British ship,[10] but a British company whose shareholders are all aliens may do so.[11] There are certain restrictions on the employment of aliens on British vessels (1919 Act, s. 5). It is incompetent for an alien to hold a pilotage certificate in any pilotage district in Great Britain, with certain unimportant exceptions (*ib.* s. 4).

668. Aliens are subject to certain disabilities with regard to change of name (*ib.* s. 7).[12]

669. It was formerly considered, on the authority of *Miller* v. *Allen*,[13] that an alien could not competently become tutor or curator to an

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[1] *Ex parte Liebmann*, [1916], 1 K.B. 268, at 273.
[2] See 5 & 6 Geo. V. c. 8, s. 1 ; 8 & 9 Geo. V. c. 59 ; S.R. & O., 1921 (No. 1276), 1348.
[3] 1914 Restriction Act, 1 (1) (*f*), (*d*), (*e*), and (*b*) amended as above.
[4] *Buron* v *Denman*, 1848, 2 Ex. 167. [5] *Poll* v. *Lord Advocate*, 1897, 1 F. 823.
[6] *Johnstone* v. *Pedlar*, [1921] 2 A.C. 262 (per Lord Sumner, at 289 ; see also *Green* v. *Lord Advocate*, 1918 S.C. 667, at 669.
[7] *Leslie* v. *Forbes*, 1749, M. 4636, at 4637 ; Henriques, 70 ; 1914 Act, s. 17 (2).
[8] *Bartlett*, 1876, 3 Couper 357. [9] *M'Guire*, 1857, 2 Irv. 620.
[10] Merchant Shipping Act, 1894 (57 & 58 Vict. 60), s. 1 ; 1914 Act, s. 17 (3).
[11] *R.* v. *Arnauld*, 1846, 9 Q.B. 806.
[12] *Brunning* v. *Kollross*, [1923] 1 K.B. 311 ; see also D.O.R. Regs. 14H; *Ernest* v. *Metropolitan Police Commissioner*, 1919, 89 L.J. (K.B.) 42.
[13] 1792, M. 4651.

incapax.[1] Lord Fraser remarks that the disability arises "*ex publico jure*, and attaches to the alien on account of his connection with a foreign country, and his incapacity to possess real property within this kingdom." The latter disability has been removed by statute, but the former remains. Mr. Bell merely says, with regard to tutors-at-law, that it is not settled that an applicant must be within the jurisdiction of the Court.[2] It has now been decided that an alien enemy resident in this country and registered under the 1914 Restriction Act may competently be appointed executor-dative to a British subject.[3] The case of *Miller* was not before the Court, and it seems doubtful whether the decision in *Schulze* would have been the same if the older authorities had been cited. In *Miller* an American citizen, who had been appointed curator to an insane brother resident in Scotland, brought an action to recover a debt due to his ward. It was held that he was not entitled to do so. It is clearly implied in this decision that the original appointment was also invalid. It does not appear whether the pursuer was resident in the United States, but if so the two cases are distinguishable. It seems probable, at any rate, that where the applicant is outwith the jurisdiction of the Court his appointment will be refused. Possibly the rule of *Schulze* will be confined to executors-dative, by whom caution has always to be found.[4] There is old authority to the effect that an alien cannot be a judicial cautioner.[5]

670. At common law, aliens, whether in their own right or as trustees,[6] "can neither enjoy nor succeed to a feudal subject in a country to whose sovereign they bear no allegiance."[7] They might, however, transmit a right to succeed to heritage.[8] Conflicting opinions have been given as to the extent to which they might possess a limited estate in land.[9] The *ratio* of this disability was partly residence abroad and partly foreign allegiance.[10] Its scope has been gradually reduced by statute until in 1870[11] it was finally abolished. The matter is now regulated by s. 17 of the 1914 Act, which provides that "real and personal property of every description may be taken, acquired, held and disposed of by an alien in the same manner in all respects as by a natural-born British subject." This, however, only applies to interests conferred or acquired on or after 12th May 1870, and there is a general limiting clause appended (subsecs. (5) and (4)). The common law was partially revived by statute with regard to former

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[1] Irons on Judicial Factors, 164; Fraser on Parent and Child, 236; *Fenwick* v. *Hannah's Trs.*, 1893, 20 R. 848, at 851; see also *Donaldson* v. *Brown*, 1627, M. 4647.

[2] Prin. 2078.

[3] *Schulze*, 1917 S.C. 400.

[4] But see Currie on Confirmation, 4th ed., p. 73, where the decision is treated as of general application.

[5] *Collins* v. *Boyd*, 1759, M. 4648.

[6] Menzies on Trustees, 76.

[7] Erskine, iii. 3, 10; Bankton, I. ii. 64; *Leslie* v. *Forbes*, 1749, M. 4636; *Dundas* v. *Dundas*, 1839, 2 D. 31.

[8] *E. of Perth* v. *d'Eresby's Trs.*, 1869, 7 M. 642.

[9] Bell, Prin. 2135; Hunter, Landlord and Tenant, i. 192.

[10] Erskine, *ibid.*

[11] 33 & 34 Vict. c. 14, s. 2.

enemy aliens for a period of three years from 23rd December 1919 (1919 Act, s. 11 (1) (*a*) and (3)), but this temporary restriction has not been renewed.

Subsection (4).—*Liabilities.*

671. All aliens are presumed to know the law of Scotland,[1] and those who are ordinarily resident here are subject to all the liabilities affecting British subjects. They owe a temporary allegiance to the Crown,[2] and if they assist the country of which they are nationals during hostile occupation by that country of a portion of Great Britain they are guilty of treason.[3] Aliens who are ordinarily resident abroad are liable for all their acts which take effect in this country. Thus they may be interdicted from committing delicts in Scotland,[4] and they are bound to compensate according to the statutory scale workmen who are injured in their employment here.[5]

672. An alien may be declared notour bankrupt or sequestrated in Scotland,[6] provided he is subject to the jurisdiction of the Courts. As a rule this will be founded against him by arrestments *ad fundandam jurisdictionem*, but these are not competent in questions of bankruptcy.[7]

673. Income derived by aliens from British sources is subject to British income tax. With regard to income from foreign sources taxable under Schedule D, liability depends upon whether or not there is "residence" in this country, but the extent of the liability is a question of domicile. An alien who is not "resident" in Great Britain is not liable to tax even on income derived through a British trust.[8] Residence may be constituted by the possession even on lease of heritable property, provided (probably) that there has been some occupation during the year of assessment; but not by mere casual occupation of premises for less than six months.[9] An alien who is domiciled and has a residence in the United Kingdom (whether he lives in it or not) is liable in respect of his whole income from securities, stocks, shares, and rents; whereas if he is not domiciled (though he possesses a residence here) he is only taxable on that portion of his income which is brought into this country.[10]

Section 5.—Former Enemy Aliens.

674. As to what persons were formerly "enemy aliens," reference may be made to paras. 678–9 *infra*. A definition of a "former enemy

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[1] *Cloup & Pellissie* v. *Alexander*, 1831, 9 S. 448. [2] Bell, Prin. 2133.
[3] *De Jager* v. *Att.-Gen. for Natal*, [1907] A.C. 326.
[4] *Toni Tyres, Ltd.* v. *Palmer Tyres, Ltd.*, 1905, 7 F. 477.
[5] *Hunter* v. *Stadtische, etc., Gesellschaft*, 1925, 41 T.L.R. 589.
[6] *Joel* v. *Gill*, 1859, 21 D. 929; Goudy on Bankruptcy, 3rd ed., 78 and 473.
[7] *Croil*, 1863, 1 M. 509.
[8] *Williams* v. *Singer*; *Pool* v. *Royal Exchange*, [1921] 1 A.C. 65.
[9] Konstam on Income Tax, 229.
[10] Konstam, 227–8, 261–2; *Turnbull* v. *I.R.*, 1904, 7 F. 1; *Thomson* v. *I.R.*, 1904, 7 F. 8; *I.R.* v. *Cadwalader*, 1904, 7 F. 146.

alien " is given in the 1919 Act (s. 15). Certain temporary restrictions were imposed upon this class of aliens at the close of the late war. A few of these now remain in force. Former enemy aliens who were in this country on 23rd December 1919 are liable to immediate deportation unless they obtain a licence entitling them to remain (1919 Act, s. 9). Until ten years have elapsed from the end of the war (31st August 1921), no naturalisation certificates shall be granted to subjects of any country which on 8th August 1918 was at war with Great Britain, unless the applicant (i) served in the British or allied forces, or (ii) " is a member of a race or community known to be opposed to the enemy governments," or (iii) was a British subject at birth (1918 Act, s. 3 (2)). Any certificates of naturalisation granted during the late war to present or past subjects of countries which were enemies as at 8th August 1918 must be reviewed to consider the desirability of revocation in manner provided in the 1914 Act (1918 Act, s. 3 (1)).

675. There are a number of other disabilities which have only been removed as at 8th September 1925,[1] in virtue of the Former Enemy Aliens (Disabilities Removal) Act, 1925.[2] (1) The trade of winning and dealing in metal or metallic ore might only be carried on with a licence from the Board of Trade, which was not to be granted to any person or company in which former enemy aliens had an interest, unless the Board was satisfied that it was expedient.[3] (2) For a period of five years at any rate (and indefinitely after that unless Parliament otherwise determined) no banking business was to be carried on in the United Kingdom for the benefit or under the control of former enemy aliens.[4] (3) No aliens of this class might be employed on British vessels (1919 Act, s. 12).

676. During the three years from 23rd December 1919 to 23rd December 1922 further restrictions were imposed on (1) the entry of such persons into the kingdom (1919 Act, s. 10) and (2) the holding by them of land (except on short lease), or interests in " key industries " in this country or in companies owning British ships (*ib.* s. 11). These provisions have not been continued.

677. Lastly, all property and rights, whether vested or not,[5] belonging to German nationals, which on 10th January 1920 were situated in this country, were charged under the Peace Treaty with certain payments.[6] The question of nationality, for this purpose, falls to be determined by

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[1] Edin. Gaz., 1925, p. 1025. [2] 15 & 16 Geo. V. c. 43.

[3] Non-Ferrous Metal Industry Act, 1918 (7 & 8 Geo. V. c. 67), s. 1 (1) and (2) and Sched. I.

[4] Trading with the Enemy (Amendment) Act, 1918 (8 & 9 Geo. V. c. 31), s. 2 (1); S.R. & O., 1918 (No. 1649), ii. 1057.

[5] *Hohbach's Tr., infra.*

[6] Treaty of Peace Act, 1919; Treaty of Peace Order, 1919, art. 1, xvi. (S.R. & O., 1919 (No. 1517), vol. ii. p. 198); *Hohbach's Tr.* v. *Custodian for Scotland*, 1924, S.L.T. 798; *New York Life Insurance Co., Ltd.* v. *Public Trustee*, 1924, 40 T.L.R. 430; see also *Public Trustee* v. *Wolf*, [1923] A.C. 544.

German, not by British law.[1] There are similar provisions with regard to Austrian subjects.[2] In this case the question of nationality is for the Administrator to decide, and the Courts will not interfere.[3] Orders in Council may be made (under 1919 Act, s. 2 (2)) requiring information as to property and liabilities, etc., of former enemy aliens. None appear to have been made as yet.

Section 6.—Present Enemy Aliens.

Subsection (1).—*Definition and Classification.*

678. An enemy alien is a person who is either a subject of, or in some material way associated with, a country which is at war with Great Britain. War for this purpose is not deemed to have commenced until it is publicly announced by the Executive that a state of war exists with regard to a particular country.[4] The Notifications of 4th August (Germany) and 12th August 1914 (Austria) marked the official beginning of the late war.[5] The entries of Turkey and Bulgaria were declared by the Foreign Office on 5th November 1914 and 15th October 1915.[6]

679. Formerly nationality was the sole test adopted by the British Courts in determining whether or not a particular person was an enemy alien, and it still remains so in questions of the liberty of the subject.[7] But questions as to private rights are as a rule decided according to a territorial test irrespective of nationality,[8] though the later Trading with the Enemy Acts seem to revert somewhat to the former standard.[9] A definition is formulated by Mr. M'Nair.[10] It should be mentioned that owing to the peculiar provisions of the Delbrück law of 1913 certain persons will be deemed to be Germans (and thus enemies in the late war) when otherwise they would be of no nationality.[11] In determining whether a company is or is not an alien enemy, regard must be had not only to the country under whose laws it is incorporated, but also to the nationality of the persons in control of its affairs.[12] It was formerly considered in Scotland that a British subject did not become an alien enemy by voluntary residence in an enemy country.[13] It may be doubted if this is still good law. In England the opposite rule pre-

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[1] *In re Chamberlain's Settlement*, [1921] 2 Ch. 533; *Kramer* v. *Att.-Gen.*, [1923] A.C. 528.

[2] Treaties of Peace (Austria and Bulgaria) Act, 1920; Treaty of Peace, 1920, s. 4, art. 249 (*b*); Treaty of Peace (Austria) Orders, 1920 and 1921, art. i. ix.; *Rothschild* v. *Administrator of Austrian Property*, [1923] 2 Ch. 542; *Baron Reitzies de Marienwest* v. *Do.*, [1924] 2 Ch. 284.

[3] *Baron Reitzies, supra.*

[4] *Blomart* v. *Roxburgh*, 1664, M. 16091; *Müller* v. *Thompson*, 1811, 2 Camp. at p. 610.

[5] Man. Emerg. Leg. 1–2.

[6] M'Nair, 19.

[7] See, *e.g.*, definition in Aliens Restriction (Consol.) Order, 1914, S.R. & O. (No. 1374), 6, art. 31.

[8] *Schulze*, 1917 S.C. 400, at 402.

[9] See M'Nair, 23–5.

[10] M'Nair, 104.

[11] *Vide supra*, para. 644.

[12] *Daimler Co.* v. *Continental Tyre & Rubber Co.*, [1916] 2 A.C. 307; M'Nair, 117–25.

[13] *Aitkens* v. *Crawford and Martin*, 10th June 1813, F.C.

vails.[1] There are special provisions in the 1918 Act for the recovery of British status by British women who have become alien by marriage (s. 2 (5)), and for the revocation of naturalisation certificates granted to persons who are also enemy subjects (s. 1).[2]

680. In early times aliens of this class seem to have had no rights whatsoever either in questions with the Crown or with British subjects.[3] Gradually, however, their position has improved, and they are now only subject to the disabilities set forth below.

681. Three groups of enemy aliens may be distinguished :—(1) Those who reside in an enemy country ; (2) those who reside in a neutral country ; and (3) those who reside in Great Britain and comply with the terms of the Restriction Acts. The Defence of the Realm Regulations are not treated here, as these expired on 31st August 1921.[4] Enemy aliens who reside in this country and do not comply with the necessary restrictions would in all probability be regarded as if they were resident in an enemy country.

Subsection (2).—*Enemy Aliens resident in an Enemy Country.*

(i) *Public Rights.*

682. Such persons, if they are temporarily in Great Britain, will, as a rule, be allowed to leave the realm, provided they are not combatants.[5] Those who elect to remain, automatically fall into the third class above mentioned. Naturally, those resident in enemy countries do not come into contact with the British Government unless in the capacity of prisoners of war, but in any event they would seem to have no public rights whatsoever.

(ii) *Private Rights.*

683. Aliens of this class are subject to severe limitations in respect of (*a*) capacity to sue, (*b*) contract rights, and (*c*) the right of commercial freedom. These restrictions are all based on the principle that "the enemy is not to be benefited even to the smallest extent."[6] The disabilities of alien enemies resident in an enemy state with regard to enforcement of rights have been attributed in England to the theory that "such an one cannot approach the King."[7] This *dictum* has been adopted by L. P. Strathclyde in *Van Uden* v. *Burrell*.[8] It is submitted, however, that the true view is that of Professor Bell,[9] which was approved by Lord Skerrington in the same case.[10] These restrictions

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[1] See *Scotland* v. *S.A. Territories, Ltd.*, 1917, 33 T.L.R. 255.
[2] See also para. 706.
[3] *Sylvester's* case, 1702, 7 Mod. Rep. 150.
[4] See note 2 to para. 664.
[5] See, *e.g.*, Statement by Home Office, dated 5th August 1914, reprinted in M'Nair, 21-2 ; the O. in C. referred to in the Statement does not support it, see Man. Emerg. Leg. 6.
[6] Bell, Com. i. 326.
[7] *Continental Tyre Co.* v. *Daimler Co.*, [1915] 1 K.B. 893, per Buckley L.J. at 918.
[8] 1916 S.C. 391, at 394.
[9] *Vide supra*, and i. 323.
[10] *Van Uden, ut supra*, at 397.

are thus imposed primarily upon private rights for reasons of public policy, and are only incidentally an illustration of the fact that aliens of this class have no *locus standi* in questions with the British Crown.

684. The leading principle under the first head is that an alien enemy cannot make any application to the Courts of this country.[1] He cannot even apply for a writ of *habeas corpus* in England.[2] He is not entitled to sue for money due to him.[3] Where an action has already been commenced before the outbreak of war it will be sisted.[4] Where an enemy alien is sisted as a pursuer in one of two conjoined actions, both of these will be sisted.[5] Such a person may not reclaim,[5] but in England it has been held that if he is the defender he may appeal.[6] He may always be sued, and in Scotland he may raise a counter action, at any rate in Admiralty causes,[7] whereas in England he is only entitled to plead his claim as a set-off.[8] Arrestments on the dependence at the instance of an alien will be recalled if he becomes an enemy owing to the outbreak of war.[9] The agents of such a person are subject to the same disabilities[10] as are his assignees,[11] and even those who arrest his property in this country.[12] But a controller appointed to an enemy business under the Trading with the Enemy Acts is entitled to sue.[13]

685. The above rule—that an enemy alien resident in an enemy country is not entitled to persist in any application to the British Courts—does not apply in the following cases :—

(i) Where the pursuer holds a licence to trade from the Government, or has come to this country under official protection.[14]

(ii) Where the action is in the Prize Court.[15]

(iii) Where the alien is merely a nominal co-pursuer,[16] or perhaps in any case in which he sues *en autre droit*.[17]

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[1] Bankton, I. ii. 62 ; see M'Nair, chaps. ii. and iii..

[2] *Ex parte Liebmann*, [1916] 1 K.B. 268 ; but see M'Nair, 53–4.

[3] *Blomart* v. *Roxburgh*, 1664, M. 16091 ; *Wells* v. *Williams*, 1697, 1 Ld. Raym. 282 ; *Arnauld and Gordon* v. *Boick*, 1704, M. 10159 ; *The "Hoop,"* 1799, 1 Chr. Rob. 196 ; *Carron* v. *Cowan & Co.*, 28th Nov. 1809, F.C. ; *Wright* v. *Hutcheson*, 1810 (refd. to in *Carron*) ; *Orenstein & Koppel* v. *Egyptian Phosphate Co., Ltd.*, 1915 S.C. 55.

[4] *Carron, Wright, Orenstein & Koppel, supra.*

[5] *Craig Line Steamship Co., Ltd.* v. *N.B. Storage and Transit Co.*, 1915 S.C. 113.

[6] *In re Merten's Patent*, [1915] 1 K.B. 857.

[7] *Burgess* v. *Guild*, 12th Jan. 1815, F.C.

[8] *Re Stahlwerk*, [1917] 2 Ch. 272.

[9] *Van Uden, supra.*

[10] *Guyot-Guenin & Son* v. *Clyde Soap Co.*, 1916 S.C. 6.

[11] *Johnston & Wright* v. *Goldsmid*, 15th Feb. 1809, F.C.

[12] *Fergusson & Co.* v. *Brown & Tawse*, 1917 S.C. 570 ; but see 1918 S.C. (H.L.) 125.

[13] *Continho, Caro & Co.* v. *Vermont & Co.*, [1917] 2 K.B. 587.

[14] Bell, Com. i. 326 ; Prin. 43 ; *Usparicha* v. *Noble*, 1811, 13 East, 332 ; *Kensington* v. *Inglis*, 1807, 8 East, 273 ; *Flindt* v. *Scott*, 1814, 5 Taunt. 674 ; *The "Hoop," supra* ; see also *Burgess, supra* ; and *Davidson* v. *Public Trustee*, 1925 S.C. 451.

[15] *The "Möwe,"* [1915] P. 1.

[16] *Mercedes Daimler Motor Co.* v. *Maudslay Motor Co.*, 1915, 31 T.L.R. 178 ; *Rombach* v. *Gent*, 1915, 31 T.L.R. 492 ; *Rodriguez* v. *Speyer Bros.*, [1919] A.C. 59.

[17] *Villa* v. *Dimock*, 1692, Skinner, 370 ; see also *Rodriguez, supra.*

(iv) (In Scotland) where the application is by a creditor for a ranking,[1] or (in either country) by a bankrupt for his discharge.[2]

686. The disabilities imposed on the contract rights of alien enemies [3] are dealt with *sub voce* CONTRACT (*q.v.*). It will be sufficient to state the following principles:—(1) Contracts entered into with alien enemies are void *ab initio*,[4] unless a Royal licence has been obtained.[5] (2) Contracts entered into with persons who subsequently become alien enemies are *ipso facto* voided from the date of the outbreak of war,[6] with certain exceptions mentioned below. They are not merely suspended until peace, and even where they contain a clause expressly providing for continuance after the war, effect will not be given to it.[7] Certain classes of contract, however, remain in force, viz. those which are the concomitants of property.[8] It seems also that the following classes are merely suspended: (i) those between a company and its shareholders,[9] and (ii) contracts of life insurance.[10] (3) Any rights which have accrued under the second class of contracts dealt with above before the date of their abrogation will be enforceable at the termination of war.[11] In Scotland (but not in England) a payment made under a contract without consideration before war will be recoverable afterwards.[12] Whether interest will run in the interval seems to be an open question.[13]

687. Enemy aliens of the class under discussion are not entitled to trade in this country. This prohibition is based on the common law both of Scotland [14] and of England,[15] and may be dispensed with by Royal licence.[16] In the latter country, any person dealing with an enemy may even be liable to the penalties of treason, and if that is so the same result would probably be reached in Scotland, owing to the adoption of that branch of the law of England by the Treaty of Union in 1707.[17] The subject is now exhaustively dealt with by statute. The undernoted Acts, in addition to a number of Proclamations, were

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[1] Bell, Com. i. 326; cp. *In re Wilson*, 1915, 84 L.J. (K.B.) 1893.

[2] *In re Levy*, 30th Jan. 1915, The Times, cited by M'Nair, 45.

[3] On this whole subject see M'Nair, chaps. iv. v. and vii.

[4] *Johnston & Wright* v. *Goldsmid*, 15th Feb. 1809, F.C.; *Willison* v. *Patteson*, 1817, 7 Taunt. 439, at 450; Bell, Prin. s. 43; Gloag on Contract, 665.

[5] Bell, Com. i. 324.

[6] *Ertel Bieber & Co.* v. *Rio Tinto Shipping Co.*, [1918] A.C. 260.

[7] *Ertel, supra.*

[8] *Halsey* v. *Löwenfeld*, [1916] 2 K.B. 707; *Tingley* v. *Müller*, [1917] 2 Ch. 144; per Lord Dunedin in *Ertel, supra*, at 269.

[9] *Robson* v. *Premier Oil & Pipe Line Co.*, [1915] 2 Ch. 124; see M'Nair, 70–1, 125–30.

[10] *Seligman* v. *Eagle Insurance Co.*, [1917] 1 Ch. 519; see M'Nair, 148–50.

[11] Bell, Prin. 43, 2135; *Carron* v. *Cowan & Co.*, 28th Nov. 1809, F.C.; *Davis & Primrose, Ltd.* v. *Clyde Shipbuilding and Engineering Co., Ltd.*, 1917, 1 S.L.T. 297; *Penney* v. *Clyde Shipbuilding and Engineering Co., Ltd.*, 1920 S.C. (H.L.) 68.

[12] *Cantiere San Rocco* v. *Clyde Shipbuilding and Engineering Co., Ltd.*, 1923 S.C. (H.L.) 105.

[13] See M'Nair, 60–3. As to prescription, see Treaty of Peace, 1919, art. 300; *Davidson* v. *Public Trustee*, 1925 S.C. 451.

[14] Bell, Com. i. 324–6.

[15] *Girt* v. *Mason*, 1786, 1 T.R. 88.

[16] Bell, *ut supra*; *Davidson* v. *Public Trustee*, 1925 S.C. 451, at 456.

[17] See *H.M. Advocate* v. *Mitchell*, 1915 S.C. (J.) 35, at 37–8.

passed during the war,[1] and are largely still in force.[2] Special restrictions were placed upon the carrying on of banking business and trading in metallic ores, but these have now been repealed.[3] It should be noted that during the war the Board of Trade was given special powers of making or applying to the Courts for vesting orders, by which any enemy property in this country might be transferred to Custodians of Enemy Property duly appointed as such.[4] There seems to be no way in which a former enemy can recover such property if the Custodian refuses to disgorge it.[5]

Subsection (3).—*Enemy Aliens resident in a Neutral Country*

688. "The subject of a state at war with this country, but who is carrying on business here or in a foreign neutral country, is not treated as an alien enemy."[6] In other words, enemy aliens of this class are not subject to any disabilities either in public or private rights other than those affecting friendly aliens.[7] Such persons may sue in the King's Courts,[8] and may receive moneys from this country.[9] It should be remembered that under the Trading with the Enemy Acts if neutral residents are interested in businesses carried on in enemy countries they are themselves enemies,[10] and under the 1915 Act the Crown may publish black lists of neutral persons who thereupon become enemies for trading purposes. These latter provisions were suspended at the end of the late war (*i.e.* 31st August 1921),[11] but are renewed automatically on the outbreak of another war.[12] If an enemy resident in a neutral country enters Great Britain he automatically comes within the classes described in Subsection (4), *infra*, or Subsection (2), *supra*, according to whether or not he complies with the Restriction Acts.

Subsection (4).—*Enemy Aliens resident and registered in Great Britain.*

689. The *dictum* of Lord Lindley cited above applies to this class of aliens also, but it has to be modified somewhat as a result of the late war. In questions of public rights such persons are liable to be interned

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[1] 4 & 5 Geo. V. c. 87; 5 & 6 Geo. V. c. 12; 5 & 6 Geo. V. c. 79; 5 & 6 Geo. V. c. 98; 5 & 6 Geo. V. c. 105; 6 & 7 Geo. V. c. 32; 6 & 7 Geo. V. c. 52; 8 & 9 Geo. V. c. 31.

[2] See Index of Statutes in force on 31st Dec. 1924, ii. 1637, and *Brown* v. *Custodian for Scotland*, 1923 S.C. 158; see also M'Nair, 99–106, and *Orenstein & Koppel* v. *Egyptian Phosphate Co., Ltd.*, 1915 S.C. 55 (Procl. 9th Sept. 1914); *Mitchell*, *supra* (Procl. 9th Sept. 1914; 1914 Acts); *H.M. Advocate* v. *Hetherington*, 1915 S.C. (J.) 79 (Procl. 5th Aug. 1914).

[3] *Vide supra*, para. 675.

[4] *Penney*, *supra*.

[5] See *Brown* v. *Custodian for Scotland*, 1923 S.C. 158.

[6] *Janson* v. *Driefontein Gold Mines, Ltd.*, [1902] A.C. 484, per Lord Lindley at 505–6.

[7] *Vide supra*, paras. 661–70.

[8] *In re Mary, Duchess of Sutherland*, 1915, 31 T.L.R. 394.

[9] *In re Grimthorpe's Settlement*, [1918] W.N. 16.

[10] *Gebruder van Uden* v. *Burrell*, 1916 S.C. 391.

[11] See note 2 to para. 664.

[12] Index to Statutes, 1639.

in virtue of the prerogative and apart from statutory powers.[1] A writ of *habeas corpus* will not be granted in England to try the cause of the internment.[2] Further, power has been given to the Executive to make regulations affecting any particular class of aliens (1914 Restriction Act, s. 1 (3)), and this has as a matter of fact been exercised so as to impose more onerous restrictions on enemy than on friendly aliens.[3] The private rights of enemies who comply with the provisions of the Restriction Acts are unaffected. They are entitled to sue in the Courts,[4] and presumably to trade.[5] Internment does not subject an enemy to any disabilities apart from the restriction of his public rights.[6] Aliens of this class may even be appointed executors-dative.[7] If they die in England their estates will be wound up by the Public Trustee.[8]

Section 7.—Denizens.

690. A denizen is an alien born, to whom the Sovereign has granted the status of a British subject by letters patent. In former times the practice was a common one and was looked on as a variety of naturalisation effected by the authority of the Executive as opposed to that of the Legislature.[9] In recent years it has become practically obsolete,[10] though its existence is expressly recognised in the 1914 Act.[11]

691. Denization is described by constitutional lawyers as "a high and incommunicable branch of the royal prerogative," and the term is sometimes said [12] to be derived from Old French *donaison*, Latin *donatio*, "because his freedom is given unto him by the King." The old use of denizen, however, as equivalent to inhabitant or native of the country, points to another derivation as more correct etymologically, namely, from Old French *deins* = Latin *de intus*, within, from which comes *denozein* = denizen. Thus, in 1474, Caxton, Chesse, 2, 3, 104, says, "We be not *denizens* in the world but stranngers, nor wee ben not born in the world for to dwelle and abyde alway therein but for to goo and passe through hit." And so Coke upon Litt. (*ubi supra*) explains: "He that is born within the King's ligeance is sometimes called a denizen, *quasi deins née*"; and adds, "but many times denizen is taken for an alien born that is enfranchised or denizated by letters patent." [13]

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[1] *Ex parte Liebmann*, [1916] 1 K.B. 268; *ex parte Forman*, 1917, 87 L.J. (K.B.) 43.

[2] *Liebmann, supra*; but see M'Nair, 53–4.

[3] See, *e.g.*, Aliens Restriction (Consol.) Order, 1914, S.R. & O., 1914 (No. 1478), i. 26, arts. 17–8, 24–5.

[4] *Schulze, Gow & Co.* v. *Bank of Scotland*, 1914, 2 S.L.T. 455, 1916, 2 S.L.T. 207; *Princess Thurn and Taxis* v. *Moffitt*, [1915] 1 Ch. 58; *Kraus* v. *Kraus & Orbach*, 1919, 35 T.L.R. 637.

[5] See *Burgess* v. *Guild*, 12th Jan. 1815, F.C.

[6] *Schaffenius* v. *Goldberg*, [1916] 1 K.B. 284.

[7] *Schulze*, 1917 S.C. 400; but *vide supra*, para. 669.

[8] *In the Estate of Schiff*, [1915] P. 86. See also *In the Estate of Grundt*, [1915] P. 126.

[9] See, *e.g.*, *Leslie* v. *Forbes*, 1749, M. 4636, at 4641; Henriques, 17–9 and 95–6.

[10] See Henriques, 18.

[11] Sec. 25; *cf.* 1870 Act, s. 13.

[12] Coke upon Litt. 129*a*.

[13] See Wharton's Law Lexicon, Skeat's Etymological Dictionary, and The Oxford English Dictionary, *voce* "Denizen."

692. The requisites for denization are (1) consent of the Crown and (2) oath of allegiance. The advantages are that it enables the applicant to dispense with the requirements as to residence, etc., which are essential to naturalisation, and the delay and expense of a private Act of Parliament. The grant is in the absolute discretion of the Sovereign, and in practice will not be made unless the Home Office is satisfied that naturalisation is unsuitable. The grant takes effect as from its date.[1] Children already born must be expressly included or they will remain aliens.[2]

693. In Scotland it seems that a denizen is not subject to any disabilities, except that in order to own a British ship he must be either resident in His Majesty's Dominions, or a partner in a firm carrying on business there.[3] Professor Bell states that while he may purchase heritage or succeed to it under a will, yet he cannot take it by inheritance.[4] It may be doubted whether if the greater right be conceded (*i.e.* acquisition), the lesser would be excluded (*i.e.* succession),[5] but in any event the words of the grant now in use—"acquire receive take hold purchase and possess"[6]—seem amply sufficient to cover inheritance. The same authority considers that a denizen cannot transmit heritage to heirs born before the date of the letters patent, "till which time he had no inheritable blood."[7] But the law of Scotland does not recognise the doctrine of tainted blood.[8] Further, the difficulty seems to be avoided by the use of the words "may use and enjoy the same to him and his heirs for ever . . . and may give sell alienate and bequeath the same to any person or persons as he or they shall think fit."[9] In England. denizens are debarred by the Act of Settlement[10] from public offices or from obtaining a grant of lands from the Crown, "except such as are born of English parents."[11]

Section 8.—Loss of Alien Status and Acquisition of British Nationality.

Subsection (1).—*Methods of acquiring British Nationality.*

694. A British subject has been defined as a person who owns permanent allegiance to the Crown.[12] While this may be the theory of the matter, the only reliable definition in practice is a person who, by virtue of common law or statute, is deemed to be such. In early times the only persons who were recognised as British subjects were the natural born, "who are those that are born within the King's

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[1] *Fourdrin* v. *Gowdey*, 1834, 3 My. & K. 383.

[2] For Forms of Petition and of Letters Patent, see Eng. Ency., pp. 32–4. The fees payable amount to £120. See S.R. & O. Rev., 1904, ii. Clerk of the Crown in Chancery, p. 3.

[3] Merchant Shipping Act, 1894, s. 1.

[4] Prin. 2137; see also Bankton, I. ii. 63.

[5] See, *e.g.*, *Leslie*, *supra*, at 4636.

[6] Eng. Ency., Forms, xi. 33.

[7] Bell, Prin. 2137.

[8] *Earl of Perth* v. *Lady Willoughby d'Eresby's Trs.*, 1869, 7 M. 642, per L. J.-C. Patton at 653-4.

[9] Ency., *supra*, at 33–4.

[10] 12 & 13 Will. III. c. 2, s. 3.

[11] See *Rex* v. *Speyer*, [1916] 2 K.B. 858.

[12] Dicey, Conflict of Laws, 2nd ed., 164.

legiance or dominions ; and the children of such, though born abroad." [1] At the present day the different methods of acquiring British nationality are as follows :—(1) By birth ; (2) by inheritance ; (3) by annexation of territory ; (4) by choice, (*a*) by naturalisation, and (*b*) by declaration ; (5) in the case of women, (*a*) by marriage, (*b*) by naturalisation of husband, and (*c*) by declaration ; and (6) in the case of children in minority, by naturalisation of parent.

695. The whole subject was formerly regulated by common law and by the various Naturalisation Acts (now all repealed), and with respect to all persons born prior to 1st January 1915 it is still so regulated (1914 Act, s. 1 (3)). The status of those born on or after that date is determined by the 1914 Act as amended by the Acts of 1918 and 1922. A definition of a British subject is provided, for the purposes of these statutes, in s. 27 of the 1914 Act, as amended by s. 2 (6) of the Act of 1918. It is as follows :—"In this Act, unless the context otherwise requires, the expression 'British subject' means a person who is a natural-born British subject, or a person to whom a certificate of naturalisation has been granted, or a person who has become a subject of His Majesty by reason of any annexation of territory." The first and second classes referred to above are natural-born British subjects ; and thus with the third class and the first subdivision of the fourth are expressly included in the statutory definition. The sixth class is deemed to be a form of the fourth class (1918 Act, s. 2 (6), amending 1914 Act, s. 27 (2)). It would seem, however, on a strict interpretation of these provisions, that persons who acquire British nationality under heads (4) (*b*) and (5) are only British subjects at common law, or perhaps under the Restriction Acts, and that for the purposes of the 1914 and amending Acts they are aliens (an alien being defined for these purposes as "a person who is not a British subject," presumably in the restricted statutory sense of the term). It is thought that the limiting words "unless the context otherwise requires" are not sufficient to avoid the anomalous position thus created.

696. Various forms of declaration, etc., are prescribed by regulations made under the 1914 Act (ss. 19 and 24) and under former Acts (which regulations are continued in force by s. 19 (3) of the 1914 Act). With regard to evidence and penalties, reference may be made to ss. 20–23 of the 1914 Act. The consequences of the acquisition of British nationality may be far reaching.[2]

Subsection (2).—*Birth.*

(i) *Persons born prior to 1st January* 1915.

697. At common law in England and probably in Scotland also,[3] nationality was determined according to the doctrine of allegiance.

[1] Bankton, I. ii. 60.
[2] See *Don Pacifico's* case, 1850, Pitt-Cobbett, L. Cas. on Int. Law, i. 209.
[3] See Erskine, iii. 10, 10.

"It is to be observed that it is *nec cœlum nec solum*, neither the climate nor the soil, but *ligeantia et obedientia* that make the subject born." [1] In practice, however, this soon gave way to the convenient doctrine that all persons born within the King's dominions were his subjects, as they presumably owed allegiance to him. Certain persons to whom this presumption clearly did not apply were always excepted, namely, (1) children of foreign princes and ambassadors, and (2) children born to alien parents in portions of British territory in hostile occupation. Such persons are aliens. As the fiction of ex-territoriality gained force the former exception became ascribed to it, and the fiction was later extended in order to claim as British subjects all persons born on British vessels,[2] even in all probability when in foreign territorial waters.[3] Where a union of Crowns takes place, the *post-nati* of one kingdom are natural-born subjects of the other.[4] Where a separation of territory is brought about, persons born after independence has been declared by the new country are still of British birth. Only those born after the separation has been recognised by the old country are aliens.[5]

(ii) *Persons born on or after 1st January* 1915.

698. The following are to be deemed natural-born British subjects:—(*a*) "Any person born within His Majesty's dominions and allegiance" (1914 Act, s. 1 (1) (*a*); so framed in all probability to exclude the two exceptional cases referred to above); and (*b*) any person born on board a British ship whether in foreign territorial waters or not (*ib.* s. 1 (1) (*c*)).

Subsection (3).—*Inheritance.*

(i) *Persons born before 1st January* 1915.

699. At common law the nationality of the parents of a child born abroad was disregarded, and the child was an alien by the accident of its birth. The principle of the Roman *jus sanguinis* was, however, introduced by statute by the Acts 7 Anne, c. 5 (s. 3), 4 Geo. II. c. 21 (s. 4), and 13 Geo. III. c. 21 (s. 7). As a result of these provisions the children and grandchildren of a natural-born British subject are themselves British subjects wherever born.[6] The person through whom the nationality is derived must be a natural-born British subject and not merely a naturalised one,[7] and he must not have been divested of his status in any way before the birth of the claimant.[8] A subsequent change in the nationality of a father will not, however, destroy the qualification acquired by a child at birth.[9] According

[1] *Calvin's* case, 1608, 7 Rep. 1.
[2] *Marshall* v. *Murgatroyd*, 1870, L.R. 6 Q.B. 31.
[3] See Henriques, 65.
[4] *Calvin's* case, 1608, 7 Rep. 1.
[5] *Nisbett* v. *Nisbett's Trs.*, 1834, 12 S. 293, and *vide supra*, para. 648.
[6] *Dundas* v. *Dundas*, 1839, 2 D. 31; *Stewart*, 1857, 19 D. 430.
[7] *Carlebach's* case, [1915] 3 K.B. 716.
[8] *Dundas, supra.*
[9] *Atkinson* v. *Bury St. Edmunds Rec. O.*, 1917, 86 L.J. (K.B.) 415.

to Bankton,[1] nationality may be inherited through a mother as well as through a father, but in England that is not so.[2] The statutes do not apply to bastards even though subsequently legitimated.[3] Further, the ancestor must not have been attainted or be liable to the penalties of high treason or felony, or be in the service of an enemy State (Acts, *supra*). The nationality thus inherited is not transmitted to a third generation.[4]

(ii) *Persons born on or after 1st January* 1915.

700. Children born abroad to a British father are now deemed to be themselves natural-born Britons in the following cases:—(*a*) Where the parent's nationality was acquired by birth, by naturalisation, or by annexation (1922 Act, s. 1 (1)); (*b*) where the parent's nationality was acquired by other means, and either the father is (at the date of the child's birth) in the service of the Crown (as certified by a Secretary of State, 1918 Act, s. 2 (1)), or the birth has been registered at a British Consulate and the necessary declarations have been made at majority (1922 Act, s. 1 (1) and (2)), or if the child is born "in a place where by treaty, capitulation, grant, usage, suffrance or other lawful means His Majesty exercises jurisdiction over British subjects" (1914 Act, proviso to s. 1 (1)). The conditions as to registration of births are somewhat complicated (1922 Act, s. 1 (1) (v)), and a reference to the case of persons born on or after 1st January 1915 is obscure, as the section of the 1914 Act in which these provisions are incorporated (1922 Act, s. 3 (3)) only regulates the status of such persons and no others, unless the contrary is expressly provided (1914 Act, s. 1 (3)). It will be noted that the effect of the 1914 Act as amended is to disregard the grandfather of the claimant, but to allow him to trace his descent through a father whose nationality was acquired by means other than birth.[5]

Subsection (4).—*Annexation of Territory.*

701. Where territory is annexed by a country, all the inhabitants, *ante-nati* and *post-nati*, become subjects of that country.[6] It should be noted that no person can become a subject of another country by union of the Crowns. *Post-nati*, however, acquire the new nationality by birth.[7]

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[1] I. ii. 65.
[2] *Doe d. Dufoure*, 1791, 4 T.R. 300.
[3] *Shedden* v. *Patrick*, 1854, 1 Macq. 535, at 612.
[4] *De Geer* v. *Stone*, 1882, L.R. 22 Ch. D. 243; *In re Willoughby*, 1885, L.R. 30 Ch. D. 324; Westlake, 4th ed., 283.
[5] *Carlebach's* case, *supra*; see M'Nair, 4.
[6] *Mayor of Lyons* v. *East India Co.*, 1836, 1 Moo. P.C. 175, at 286–7; and see 1918 Act, s. 2 (6).
[7] *Vide supra*, para. 697.

Subsection (5).—*Choice.*

702. This may be effected either (*a*) by private statute or under the provisions of s. 2 of the 1914 Act (replacing the 1870 Act), or (*b*) by declaration. The requisites in the case of naturalisation are briefly:— (i) Five years' residence within the dominions, or Government service for a like period. The five years need not be consecutive, but must have been within the last eight years, except in the case of British women formerly married to aliens;[1] (ii) good character and knowledge of the English (or equivalent) language; (iii) *animus remanendi aut continuendi*; (iv) oath of allegiance. The Home Secretary has an absolute discretion under the statute as to whether or not he will admit a person who fulfils these qualifications to British nationality (s. 2 (3)). If he decides to do so, a certificate of naturalisation is issued.

703. Special provision has been made for the granting of extraordinary certificates of British nationality *ob majorem cautelam*, and aliens naturalised under former Acts may obtain a renewal under the 1914 Act (ss. 4 and 6). Certificates are not as a rule to be granted to persons under disability (s. 5 (3), as amended by 1918 Act, s. 2 (3)) (*i.e.* minors, lunatics, and formerly married women (s. 27)), but the Home Secretary has an absolute discretion with regard to minors (s. 5 (2), as amended by 1918 Act, s. 2 (3)), which he is in use to exercise in favour of those who intend to serve under the Crown,[2] and the names of such children may be included in the certificate granted to a parent (s. 5 (1)).[3] The restrictions upon the issue of certificates to former enemy aliens have already been discussed.[4] Natural-born British women who have become aliens by marriage, and whose husbands then become enemy aliens, may make a declaration of their desire to resume British nationality, and upon this being done the Home Secretary may in his discretion grant them certificates of naturalisation (s. 10, as amended by s. 2 (5) of 1918 Act). The status acquired by naturalisation may be forfeited in certain cases.[5]

704. An attempt has been made in the Act of 1914 to provide for Imperial certificates of naturalisation to be granted by the Colonies as well as by the mother country (s. 8, as amended by 1918 Act, s. 2 (4)). These provisions, however, are not to take effect in Canada, Australia, New Zealand, South Africa, and Newfoundland until they are adopted by the Legislatures of these Dominions (s. 9 (1)). In the meantime, certificates granted by the Home Secretary have effect only in the remaining British possessions (s. 9 (1)), while certificates granted by the privileged Colonies are not recognised in Great Britain.[6]

705. If a father ceases to be a British subject and his family follow

[1] For details, see s. 2 (1) (*a*), (2), (5), and (6) (added by 1918 Act, s. 2 (2)).
[2] Dicey, 173.
[3] *Vide infra*, para. 708.
[4] *Vide supra*, para. 674.
[5] *Vide supra*, para. 679.
[6] *Markwald's* case, [1918] 1 K.B. 617; see E. B. Sargant in Journ. Soc. Comp. Legis. (N.S.), xxxi. 327.

him,[1] they may revert to their former status by making a declaration within twelve months of attaining majority (1914 Act, s. 12 (2)).

Subsection (6).—*Marriage, etc.*

706. At common law a woman's nationality was not affected by marriage, and an alien who married a British husband remained an alien. This has long been altered by statute. A woman is now deemed to share her husband's nationality (1914 Act, s. 10). Accordingly a foreign subject may become British (*a*) by marriage to a Briton or (*b*) by naturalisation of her husband. Nationality so acquired is retained as a widow or *divorcée* (s. 11), or, unless the Home Secretary directs to the contrary, even after the husband's naturalisation certificate has been revoked (s. 7A added by 1918 Act, s. 1).[2] The provision in the 1870 Act (s. 10 (2)) for the issue of certificates of readmission to British nationality to British women who married aliens has not been continued. A British woman who has become an alien through her husband may, however, become naturalised upon specially favourable terms after the death of that husband or the dissolution of the marriage (s. 2 (5)). Under the 1870 Act, s. 10 (2), it was probably not competent for a *divorcée* to re-acquire British nationality in this way, and in one case a private Act of Parliament was obtained in order to give effect to this desire.[3]

707. Section 10 also provides that where a husband ceases to be a British subject, his wife, who would otherwise follow him into alienage, may retain her British status by making a declaration that she desires to do so. It will be noted, of course, that this procedure is not necessary where the husband's loss of nationality is due to revocation of a certificate of naturalisation, unless the Home Secretary intervenes (s. 7A added by s. 1 of 1918 Act).

Subsection (7).—*Naturalisation of Parent.*

708. Apart from naturalisation in their own right, there is one special way in which alien children may acquire British nationality. When a parent becomes naturalised in this country the Home Secretary may include any minor children already born in his certificate, and they thereupon become British subjects (1914 Act, s. 5 (1)). It was formerly competent for natural-born British subjects, who had divested themselves of that status by becoming naturalised abroad,[4] or by marrying alien husbands,[5] to obtain certificates of readmission to British nationality (1870 Act, ss. 8 and 10 (2)). These provisions have not been continued in the later Acts.

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[1] *Vide supra*, para. 656.
[2] *Vide supra*, para. 655.
[3] von Roemer's Resumption of British Nationality Act, 1895.
[4] *Vide supra*, para. 650.
[5] *Vide supra*, para, 654.

ALIAS, ALIBI.

See CRIME.

ALIENATION

BY BANKRUPT. *See* BANKRUPTCY.

OF HERITAGE. *See* CHARTER; DISPOSITION; ENTAIL.

ALIMENT.

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Section 1.—Definition.

709. Aliment is the maintenance or support which certain persons are legally entitled to claim from others on account of their connection with them by kinship or marriage.

Section 2.—Order of Liability amongst Kindred.

710. An indigent person is entitled to claim aliment from the members of his family in the following order, those more remote having no liability unless those nearer are unable to discharge the obligation:—(1) Decendants, in order: first, children, then grandchildren, etc. It appears that children, and even grandchildren, are liable before the parents of the indigent person; but the point does not seem to have arisen.[1] (2) The father, or, in certain cases, his representatives. (3) The mother.[2] Erskine in his Institutes[3] postpones the liability of the mother to that

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General Authorities.—Stair, i. 4, 10, i. 5, 7 *et seq.*; More, Notes, xxiii.–iv., xxix.; Bankt. i. 6, 4, i. 6, 13 *et seq.*; Bell, Com., 7th ed., i. 680–1, i. 58–9; Bell, Prin., ss. 1065, 1538, 1545, 1620, 1629, 2062; Ersk. i. 5, 26, i. 6, 19, 41, 56, 57, 58, ii. 9, 62, iii. 3, 29; Fraser, P. & C., 3rd ed., 98 *et seq.*; H. & W. i. 837 *et seq.*, 905, 912, 965 *et seq.*; Dunlop, Parochial Law, 369 *et seq.*; Dickson on Evidence, s. 163; Walton, H. & W., 2nd ed., 98 *et seq.*, 239 *et seq.*, 378.

[1] Fraser, P. & C., 3rd ed., p. 100; Dunlop, Parochial Law, p. 371; Guthrie Smith, Poor Law, p. 256.

[2] Ersk. Prin. iii. 1, 4; Fraser, P. & C. 101; More, Notes on Stair, 29.

[3] i. 6, 56.

of paternal ascendants ; but this seems erroneous.[1] (4) The paternal grandfather.[2] It is doubtful whether the claim transmits against the grandfather's representatives except where it has been made and acknowledged by him during his lifetime.[3] Where the father and mother were both destitute the paternal grandfather was held liable.[4] (5) The paternal grandmother. (6) The paternal great-grandfather, etc. (7) The maternal grandfather, and so on, in like order.[5]

711. For the support of a married woman her husband is primarily liable. But a father is not bound to aliment the widow of his deceased son, at any rate unless she is the mother of the next heir of entail ;[6] nor is he bound to aliment his son's wife if she is deserted by her husband.[7] A brother is not bound *ex debito naturali* to aliment his brothers or sisters, and still less more distant collaterals ; but he may be liable as his father's representative.[8] A son-in-law, not *lucratus* by his marriage, is not liable to support his wife's parents.[9] A stepmother is not liable *super jure naturæ*.[10] A stepfather is liable during the marriage, as having taken liability, for his wife's antenuptial debts ; but if married since January 1, 1878, his liability is limited to the amount by which he was *lucratus* by the marriage.[11]

Section 3.—Claims of Legitimate Descendants.

Subsection (1).—*General.*

712. By the law of nature, as recognised in our jurisprudence, parents are bound to support their children, for whose existence they are responsible. Nor is this obligation limited to immediate children. It extends to grandchildren, or even more remote descendants, provided that the ascendants nearer in degree are unable to fulfil the obligation. A renunciation or discharge of such claims is invalid, as *contra bonos mores*.[12] The claim for aliment is in a sense a claim of debt, and transmits against the representatives of the person liable. So a posthumous child

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[1] As to the mother's liability in general, see Stair, i. 5, 7 ; Bankt. i. 6, 13 ; *Buchan* v. *Buchan*, 1666, Mor. 411 ; *Scott* v. *Sharp*, 1759, Mor. 440 ; *Kirkland* v. *Kirkland*, 1685, Mor. 403 ; *Macdonald* v. *Macdonald*, 1846, 8 D. 830 ; *Fairgrieves* v. *Henderson*, 1885, 13 R. 98 ; *Dick*, 1895, 3 S.L.T. No. 311 ; *Whyte* v. *Whyte*, 1901, 3 F. 937.

[2] *Bell*, 1890, 17 R. 549.

[3] *Leslie Parish Council* v. *Gibson's Trs.*, 1899, 1 F. 601 ; *Smith* v. *Smith's Trs.*, 1882 (O.H.), 19 S.L.R. 552.

[4] *Christie* v. *M'Millan*, 1802, M. App. *voce* Aliment, No. 5 ; *Tait* v. *Whyte*, 1802, M. App. *voce* Aliment, No. 3 ; *Brown* v. *Brown*, 1824, 3 S. 247 ; *Pagan* v. *Pagan*, 1838, 16 S. 399 ; *Bell v. Bell*, 1895 (O.H.), 2 S.L.T. 598.

[5] *Wilson* v. *Kirk Session of Cockpen*, 1825, 3 S. 547 ; Fraser, P. & C. 102.

[6] *Hoseason* v. *Hoseason*, 1870, 9 M. 37.

[7] *Reid* v. *Reid*, 1897 (O.H.), 4 S.L.T. 282 ; *Mackay* v. *Mackay's Trs.*, 1904, 6 F. 936.

[8] *Mackintosh* v. *Taylor*, 1868, 7 M. 67 ; *Eisten* v. *N.B. Railway Co.*, 1870, 8 M. 980 ; Stair, i. 5, 10 ; Ersk. i. 6, 58 ; Fraser, P. & C. 102.

[9] *Dear* v. *Duncan*, 1896 (O.H.), 3 S.L.T. 241.

[10] *Macdonald* v. *Macdonald*, 1846, 8 D. 830 ; *Barry's Trs.* v. *Barry*, 1888, 15 R. 496.

[11] 40 & 41 Vict. c. 29, s. 4 ; *M'Allan* v. *Alexander*, 1888, 15 R. 863.

[12] Stair, i. 5, 1 ; Bankt. i. 6, 7.

was found entitled, as a creditor, to aliment out of the father's trust estate.[1] The claim of children is payable, in the first instance, out of legitim.[2] But the claim of legitimate children for aliment cannot compete with claims of the father's creditors, or entitle the children to a ranking in his sequestration.[3] A divorced husband remains liable for aliment of the children of the marriage.[4]

Subsection (2).—*Duration of Obligation.*

713. The obligation is perpetual, but is suspended when the child becomes self-supporting.[5] A son is not entitled to look to his father for support when he is major, and has been put to any trade or profession.[6] If his profession will not yield him a subsistence, he must turn to other pursuits. Nor can be claim aliment if, even before majority, he has left his father's house, and has supported himself by his own industry. But a young man apprenticed by his parents to a profession is entitled to reasonable aliment from them until he has learned his business.[7] A daughter has a claim to be supported by her father till her marriage, if her father is in such a position that it would be contrary to the usages of society for her to earn her own livelihood. In the humbler ranks of life her claim is suspended when she can earn her own subsistence.[8] But although the child has been self-supporting, the parent's obligation is not extinguished, and revives if the child becomes unable to support itself.[9]

Subsection (3).—*Measure of Obligation.*

714. The obligation is to supply food, clothing, and other *necessaries*. The measure is "support beyond want . . . and all that is beyond that is left to parental affection."[10] But this does not mean that the father can discharge his obligation by giving the child the relief to which he would be entitled as a parish pauper. The child is entitled to be "secured against that pressure of want, which would place him in the position of a pauper, relatively to his position in life."[11]

715. The general rule is that the person upon whom the burden falls may implement it in the way least oppressive to himself, provided this

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[1] *Spalding* v. *Spalding's Trs.*, 1874, 2 R. 237.
[2] *Urquhart's Exr.* v. *Abbott*, 1899, 1 F. 1149.
[3] *Oncken's Judicial Factor* v. *Reimers*, 1892, 19 R. 519.
[4] *Foxwell* v. *Robertson*, 1900, 2 F. 932.
[5] Ersk. i. 6, 56.
[6] *Smith* v. *Smith*, 1885, 13 R. 126.
[7] *Whyte* v. *Whyte*, 1901, 3 F. 937.
[8] Ersk. i. 6, 56; Fraser, P. & C. 124; *Dunn* v. *Matthews*, 1842, 4 D. 454; *Cleland and Geddes*, 1678, Mor. 449; *Dalziel* v. *Dalziel*, 1788, Mor. 450; *Bissets* v. *Bisset*, 1748, Mor. 413.
[9] *Smith* v. *Smith*, *supra*; *Parochial Board of Elgin* v. *Parochial Board of Kinloss*, 1893, 20 R. 763.
[10] A phrase of L. Kames approved of by L. Redesdale, *Maule* v. *Maule*, 1825, 1 W. & S. 266, in C. of S., July 9, 1823, F.C., and 2 S. 464.
[11] Per L. P. Inglis in *Thom* v. *Mackenzie*, 1864, 3 M. 177; *Foulis* v. *Fairbairn*, 1887, 14 R. 1088.

causes no injury to the person alimented.[1] So the parent may, if he choose, compel the child to live in a separate lodging ;[2] and an offer by the father to take the child into family with himself is in general a sufficient defence.[3] It was held to be so even where the claimant was a married woman, and would have had to leave her husband to enter her father's house. In that case the father's means were very small.[4] And where a grandchild was eight years old, and the paternal grandfather was in straitened circumstances, an offer by him to take the child into his house was held a good answer to a claim for aliment by the child's mother.[5] But where it would be dangerous to the child's safety or morals to live with its father, as where he has formerly maltreated it, he cannot discharge his obligation by offering to take the child.[6] It is a valid defence that the ascendant is so poor that he could not support the descendant without being himself greatly impoverished.[7]

Section 4.—Illegitimate Children.

Subsection (1).—*Liability of Parents.*

716. The father and mother of an illegitimate child are jointly liable to aliment the child until it is able to support itself. The inability of either parent casts the whole liability on the other.[8] But in order to fix the father with liability, the paternity must be admitted, or must be established in a Court of law.[9] His debt is to the child, or, in a sense, to the community, which is not unnecessarily to be taxed to support the fruit of his profligacy.[10] So a discharge by the mother of all claims for a single sum will not prejudice the child's natural right to demand aliment from its father ; and either the mother or a third person who has supported the child may have recourse against the father, in spite of the discharge.[11] It is no defence to an action by an illegitimate child against her deceased father's estate for aliment that he had made an agreement with third parties for her adoption and aliment.[12] The obligation is a claim for debt, and transmits against the parents' representatives.[13] An illegitimate child is in this respect in a better position than

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[1] Fraser, P. & C. 107 ; *Bell* v. *Bell*, 1890, 17 R. 549.

[2] *Bain* v. *Bain*, 1860, 22 D. 1021 ; Bell, Prin. s. 1630 ; Stair, i. 5, 7.

[3] Ersk. i. 6, 56 ; Fraser, 92 ; Bankt. i. 6, 13 ; *Dick* v. *Dick*, 1666, Mor. 409 ; *Buchan*, 1666, Mor. 411 ; *Smith* v. *Smith*, *ut supra*.

[4] *Wallace* v. *Goldie*, 1848, 10 D. 1510.

[5] *Bell* v. *Bell*, *ut supra* ; and see *Jameson* v. *Jameson*, 1845, 8 D. 86.

[6] *Ketchen* v. *Ketchen*, 1871, 9 M. 690 ; *Hepburn*, 1734, Mor. 410 ; *Morrison*, 1716, Mor. 410.

[7] Stair, i. 5, 7 ; Ersk. iii. 3, 89 ; *Wilson* v. *Kirk Session of Cockpen*, 1825, 3 S. 547 ; *Allan* v. *Allan*, 1895, 3 S.L.T. 137.

[8] *Oncken's Judicial Factor* v. *Reimers*, 1892, 19 R. 519 ; *Clarke* v. *Carfin Coal Co.*, 1891, 18 R. (H.L.) 63.

[9] See *Downs* v. *Wilson's Tr.*, 1886, 13 R. 1101.

[10] Per Lord Watson in *Clarke*, *ut supra*, at 68.

[11] *A. B.* v. *C. D.*, 1842, 4 D. 670.

[12] *A. B.* v. *C. D.'s Exr.*, 1900, 2 F. 610.

[13] *Oncken's Judicial Factor* v. *Reimers*, 1892, 19 R. 519.

a legitimate child, as the mother is entitled to rank on the father's estate for the child's future aliment as a contingent claim.[1]

717. The mother is as much a debtor to the child as is the father, and her claim against him is for rateable contribution towards the payment of a debt for which they are jointly liable.[2] The liability of the parents is equal ; and if the mother leave the child in the father's custody during the period in which she might claim to have the child with her, the father may sue her for relief to the extent of one-half.[3] So where the father and mother of illegitimate twins agreed that each of them should keep a child, and the mother, in spite of this agreement, subsequently brought an action against the father for a contribution towards the aliment of the child she kept, it was held that the father was not so liable.[4] Her claim is not affected by the triennial prescription, which applies only to claims founded on contract.[5] The mother's liability to aliment her natural child, as being one of her antenuptial debts, was formerly transferred to her husband if she married.[6] His liability, if married since January 1, 1878, is now limited to the amount by which he is *lucratus* by the marriage.[7] A married woman whose husband had gone abroad and had not been heard of for some years, was found to have a title to sue for aliment of an illegitimate child.[8]

718. It is only the parents of a bastard who are liable to maintain it. A grandfather is not liable.[9] If he has alimented the child, he may have a claim for relief against the parish liable.[10] Where the mother petitioned for the custody of her illegitimate child from a person who had with her consent adopted it, the Court ordered her to pay past aliment, but refused to make such a payment a condition of delivery of the child.[11] Failing the father and mother, the bastard's claim for aliment is against the parish.[12]

Subsection (2).—*How long Mother entitled to Relief.*

719. The law with regard to the duration of the mother's claim to relief has been that stated by Lord President Inglis : " The general rule in such cases is that the father of an illegitimate child has to contribute one-half to its support till it is the age of seven, and in some cases till the further

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[1] *Downs* v. *Wilson's Tr., ut supra* ; *Oncken, ut supra.*

[2] Bell, Prin. s. 2062 ; Com., 7th ed., i. 681 ; Fraser, P. & C. 148 ; *Downs, ut supra* ; see Poor Law Act (8 & 9 Vict. c. 83), s. 80.

[3] *Alexander*, 1883, Guthrie, Select S.C. Cases, 2nd ser. 13.

[4] *Wilson* v. *M'Kimmis*, 1905, 7 F. 538.

[5] *Moncreiff* v. *Waugh*, 1859, 21 D. 216 ; Dickson on Evidence, s. 488, and cases cited ; see *Westlands* v. *Pirie*, 1887, 14 R. 763 ; *Ligertwood* v. *Brown*, 1872, 10 M. 832.

[6] *Aitken* v. *Anderson*, 1815, Hume, 217.

[7] 40 & 41 Vict. c. 29, s. 4 ; see *M'Allan* v. *Alexander*, 1888, 15 R. 863.

[8] *M'Quillan* v. *Smith*, 1892, 19 R. 375.

[9] *Nicoll* v. *Dundee Heritors*, 1832, 10 S. 670.

[10] *Weepers* v. *Kennoway*, 1844, 6 D. 1166 ; *Lumsden* v. *Leslie*, 1846, 8 D. 1251.

[11] *Kerrigan* v. *Hall*, 1901, 4 F. 10.

[12] Fraser, P. & C. 150.

age of ten. The reason for that rule is that during these years it is proper that the child should be left with its mother, and that it is not able to do anything for its own support. After that age a great deal depends upon the condition of parties ; and if the mother chooses to go on keeping the child, without asking for more money or insisting upon the father taking the child, then, if she thinks fit to bring an action for aliment of the child at the end of two or three years, she may be held to be debarred by her conduct from making any such demand. On the other hand, if the father of the child desires to have the custody and charge of the child, then is the time for him to offer to take it ; and if the mother does not offer to keep it, the father will have to support it until it is fourteen, or until it is able to do for itself." [1] In this case the mother who had kept a delicate boy until he was fifteen recovered arrears of aliment against the father up to the age of twelve. As to *mora* as a bar, see the cases undernoted.[2]

720. Seven is probably the lowest age at which a father of an illegitimate child can relieve himself of his obligation to contribute by offering to take the child himself.[3] Where the man who has been found to be the father persistently denies the paternity of the child, but nevertheless offers to take it into his custody at the age when this is usual, it is doubtful if this is an offer which the mother is bound to accept.[4] The mother is not bound to make an offer to give the child to its father when it is seven years old. If he leaves it with her, knowing it cannot support itself, and if she intimates to the father that she holds him liable, his liability continues.[5]

Subsection (3).—*Duration and Amount of Aliment.*

721. With regard to the duration of aliment, the rule is that the child is entitled to aliment till it is able to support itself. This is a question of circumstances. A common practice is to give decree in the first instance for aliment till the age of seven in the case of boys and ten in the case of girls, reserving the right to make a further application at the expiration of the first period. It is to be observed that the age of seven in boys, as that at which they may be supposed to do something for their own support, was fixed upon at a time when there was more opening for child labour than at present. The Factories Acts and Mines Acts have much restricted the avenues for such labour, and the requirements of the Education Act make it in most cases impossible for a boy of seven to earn anything. But as circumstances are so liable to change, seven years is probably a period long enough for which to fix the amount at first. A renewed application may easily be made at

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[1] *Dunnet* v. *Campbell*, 1883, 11 R. at 282.

[2] *Westlands* v. *Pirie*, 1887, 14 R. 763 ; *Lamb* v. *Paterson*, 1842, 5 D. 248.

[3] *Caldwell* v. *Stewart*, 1773, 5 Br. Sup. 390 ; *Keay* v. *Watson*, 1825, 3 S. 561 (N.E. 387) ; *Hardie* v. *Leith*, 1878, 6 R. 115 ; Fraser, P. & C. 161.

[4] *Westlands*, *ut supra*.

[5] *Shearer* v. *Robertson*, 1877, 5 R. 263.

the expiration of that period.[1] The father has been held liable to aliment a male child till twelve [2] or thirteen [3] years of age; and the cases must be few in which a girl under twelve is able to support herself.[4] The obligation, apart from special circumstances, falls, at latest, on the child's attainment of the age of puberty.[5] "There is no case in which a parent (whether father or mother) who had launched a bastard into the world, after educating and fitting the child to support itself, has been held liable, upon the child subsequently becoming indigent, to relieve its necessities." [6] But, as in the case of legitimate children, if the child is unable from bodily or mental infirmity to support himself, his parents are bound to maintain him during his entire life.[7]

722. The amount of aliment granted has in practice varied in different counties.[8] In the latest case the Court after consultation between Divisions allowed 4s. 6d. per week.[9] Decree will be granted irrespective of the ability of the father to pay, as the claim is simply one of debt.[10] Fraser says the rank of the father is not an element for consideration, and that more will not be allowed than is necessary for bare subsistence.[11] And it rather seems that the position of the mother is also immaterial, and that if she belong to the upper class, and chooses to bring up and educate her child suitably to her own station, she cannot claim from the father more than would be given to a woman in the humbler ranks. The considerations as to the measure of support being relative to the child's position in life, which were advanced by L. P. Inglis in *Smith* v. *Smith*,[12] do not seem applicable to the case of an illegitimate child, which at its birth does not take the rank of either its father or its mother.[13]

Section 5.—Claims by Ascendants.

723. The obligation between parents and children is reciprocal, and children are bound to support their paternal and maternal ascendants.[14] "In order to support the claim of a father, two things are necessary: first, that the father should be indigent; and second, that the children

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[1] *Baird*, 1877, Journal of Jurisprudence, vol. xxi. p. 525.
[2] *Dunnet* v. *Campbell*, 1883, 11 R. 280.
[3] *Shearer* v. *Robertson*, 1877, 5 R. 283.
[4] Bell, Prin. s. 2062; Fraser, P. & C. 154; *Short* v. *Donald*, 1795, Mor. 442.
[5] Ersk. i. 6, 56; Bell, Prin. s. 2062.
[6] Per L. Watson, *Clarke* v. *Carfin Coal Co.*, 1891, 18 R. (H.L.), at 69.
[7] *Marjoribanks* v. *Amos*, 1831, 10 S. 79; *Pott* v. *Pott*, 1833, 12 S. 183; *Anderson* v. *Lauder*, 1848, 10 D. 961; *Oncken's Judicial Factor* v. *Reimers*, 1892, 19 R. 519; *Clarke* v. *Carfin Coal Co.*, *ut supra*; *A. B.* v. *C. D.'s Exr.*, 1900, 2 F. 610.
[8] See judgment of L. Fraser when Sheriff of Renfrew, in *A.* v. *B.*, 1875, Journal of Jurisprudence, vol. xix. p. 165.
[9] *Forbes* v. *Matthew*, 1919 S.C. 242.
[10] *A.*, 1878, Journal of Jurisprudence, vol. xxii. p. 448.
[11] Fraser, P. & C., 3rd ed., 152.
[12] 1885, 13 R. 126.
[13] But see *Lamb* v. *Paterson*, 1842, 5 D. 248; Ivory's Note to Ersk. i. 6, 56; *A.*, 1878, Journal of Jurisprudence, vol. xxii. p. 448.
[14] Bankt. i. 6, 20; Stair, i. 5, 9; Ersk. i. 6, 57; Fraser, P. & C. 136; *Buie* v. *Stiven*, 1863, 2 M. 208.

should have a superfluity after providing for the maintenance of themselves and their own families." [1] In considering the amount to be given, regard will be had to the position of the claimant, and something more than the scale of an allowance to a pauper may be given. But the sum will not exceed a bare subsistence relative to the claimant's position. The wealth of the children is immaterial, provided they are in a position to discharge the obligation. But possibly it may be a reason for granting a larger sum, that the child's wealth has not been gained by his own exertions, but has come to him from his father or some other near relation.[2] In that case it was held that a mother having an income of £60 could not claim additional aliment from a son who had an income of £1500 a year. And in two cases between mothers and their children, £40 a year has been regarded as a reasonable sum to allow to ladies unaccustomed to earn money by their own work.[3]

724. Sons and daughters are equally liable; and in the case of a daughter it makes no difference that she is married, if she has separate estate.[4] A son-in-law married since the Married Women's Property Act, 1877, is not liable to aliment his wife's indigent parents beyond "the value of any property which he shall have received from, through, or in right of his wife, at, before, or subsequent to the marriage." [5] But the father's estate or his representatives may be liable before the children for the aliment of their mother.[6] It has been held in two Outer House cases that a child against whom an action for aliment was raised, could not insist on its being dismissed on the plea that there were other children able to discharge their share of the obligation, and that these had not been called.[7] The obligation transmits against the children's representatives.[8]

725. A parent, as has been seen, may in general implement his obligation by an offer to take the child into his own house. But the converse does not hold good. If the parent is unwilling to live in the child's family, he must, as a general rule, be provided with a separate maintenance. But this is a question of circumstances; and if the child's means are very small, such an offer may be regarded as a sufficient implement of the duty.[9]

726. A bastard child is not liable to aliment either his mother or his putative father.[10]

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[1] *Hamilton* v. *Hamilton*, 1877, 4 R. 688, per L. P. Inglis.

[2] *Landers* v. *Landers*, 1859, 21 D. 706.

[3] *Thom* v. *Mackenzie*, 1864, 3 M. 177; *Foulis* v. *Fairbairn*, 1887, 14 R. 1088.

[4] *Foulis, ut supra.*

[5] *M'Allan* v. *Alexander*, 1888, 15 R. 863.

[6] See *infra*, ss. 5 and 10; Fraser, P. & C. 137; *M'Culloch*, 1778, 5 Br. Sup. 376.

[7] *Duncan* v. *Duncan*, 1882, 19 S.L.R. 696; *Dear* v. *Duncan*, 1896, 3 S.L.T. No. 379; see *Hamilton* v. *Hamilton*, 1877, 4 R. 688.

[8] *Buchanan* v. *Thomson*, Jan. 21, 1813, F.C.; *Muirhead* v. *Muirhead*, 1849, 11 D. 1262, and 12 D. 356.

[9] *Greig*, 1817, Dunlop, Parochial Law, 372, n. 5; *Jackson* v. *Jackson*, 1825, 4 S. 186; *White* v. *White*, 1829, 7 S. 567; *Heritors of Ettrick* v. *Sword*, 1824, 2 S. 715; *Buie* v. *Stiven*, 1863, 2 M. 208; Fraser, P. & C. 141.

[10] *Clarke* v. *Carfin Coal Co.*, 1891, 18 R. (H.L.) 63.

Section 6.—Aliment ex jure Representationis.

727. An eldest son who has succeeded to a "competent estate" is bound to aliment his younger brothers and sisters if they are unprovided for.[1] The rule applies where the succession was to moveables, and by a will.[2] It applies to a half-brother consanguinean;[3] and a son or daughter who succeeds to a mother is, as representing her, liable to aliment other children who are unprovided for.[4] Where this liability *ex jure representationis* exists, the heir is liable before persons, *e.g.* the mother, whose liability is only *super jure naturæ*.[5] But when the estate is small and the widow well provided for, she may be bound to contribute.[6] The liability transmits against the trustees or general representatives of the person liable *ex debito naturali*.[7]

728. In one case where a landed estate had passed to two distant collateral relations, these were found liable to aliment the mother and maternal grandmother of the deceased proprietor.[8] And it is thought that the heir to a considerable estate, however distantly he may be related to the deceased, would be bound to aliment the latter's children.[9] The doctrine would, probably, not be carried further. Aliment cannot be claimed on the ground that the claimant's grandfather possessed the estate, and that the heir represents him.[10] As an heir of entail does not represent his predecessor, he incurs no liability on this ground. So it has been held that an heir of entail was not bound to aliment his brothers and sisters.[11] But the fact that the heir takes under an entail will not remove his liability to aliment his own relations where he is liable *ex jure naturæ*.[12]

729. The heir's liability to aliment his brothers ceases at their majority, or even when they become minors, if the heir's means are such as to make it unreasonable that he should support his brothers. But the obligation continues if, from bodily or mental infirmity, they cannot maintain themselves.[13] As to sisters, if the estate is sufficient, and they

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[1] *Mackintosh* v. *Taylor*, 1868, 7 M. 67; *Netherlie*, 1663, Mor. 415, 2 Br. Sup. 576; Stair, i. 5, 10; Ersk. i. 6, 58, Prin. iii. 1, 4; Fraser, P. & C. 129; see *Howard's Exr.* v. *Howard's Curator Bonis*, 1894, 21 R. 787.

[2] *Thomson* v. *Wilkie*, 1678, Mor. 419; *Scott* v. *Sharp*, 1759, Mor. 440 and App. (*v.* P. & C. 1); Ivory, Note on Ersk., *l.c.*; Fraser, P. & C. 128.

[3] *Frazer* v. *Frazer*, 1663, Mor. 415.

[4] *Scott, ut supra*; *Thomson, ut supra.*

[5] *Douglas* v. *Douglas*, 1739, Mor. 425.

[6] *Bissets* v. *Bisset*, 1748, Mor. 413.

[7] *Spalding* v. *Spalding's Trs.*, 1874, 2 R. 237; *Stevenson* v. *M'Donald's Tr.*, (O.H.) 1923 S.L.T. 451.

[8] *Buchanan* v. *Morrison*, Jan. 21, 1813, F.C.

[9] Fraser, P. & C. 129; see *Howard's Exr.* v. *Howard's Curator Bonis*, 1894, 21 R. 787.

[10] *Seaton & Paterson* v. *Paterson*, 1761, Mor. 429; see *Anderson* v. *Gibson*, 1754, Mor. 427; *Duncan* v. *Hill*, Feb. 28, 1809 F.C.; *Clerk* v. *Clerk*, 1799, Mor. App., Aliment, 2; *Stuart* v. *Court*, 1848, 10 D. 1275.

[11] *Fletcher* v. *Fletcher*, July 11, 1838, F.C.; *Jackson* v. *Gourlay*, 1836, 15 S. 313; see Ersk. iii. 8, 51; Fraser, P. & C. 128; M'Laren on Wills, ii. 1162.

[12] *Muirhead* v. *Muirhead*, 1849, 11 D. 1262; 12 D. 356.

[13] *Thomson* v. *Wilkie*, 1678, Mor. 419; *Hastie & Ker* v. *Hastie*, 1671, Mor. 416; *Don* v. *Don*, 1697, Mor. 420; *Seatons*, 1764, Mor. 431.

are of a rank in which it is unusual for them to earn their own livelihood, the heir is liable to aliment them till their marriage. A married sister has no claim against her brother for aliment.[1] In the humbler ranks, the obligation ceases when the sisters are of an age to support themselves.[2] As the obligation is not a natural one, if it has once ceased, or been satisfied or discharged, it does not again revive by the claimant's falling into destitution.[3] Mr More's statement that, in a question with the parish, the representatives would still be liable, seems contrary to principle.

Section 7.—Wife's Claim against Husband.

730. The husband is bound to aliment the wife while she is living with him, and while she is living apart, if he has been guilty of adultery, or cruelty, or has deserted her, or if the conjugal cohabitation was broken up with his consent.[4] For wilful neglect, whereby she becomes chargeable to a parish, he is liable to imprisonment.[5] Unless there is a contract of voluntary separation, which bears *in gremio* an admission of adultery or cruelty, the wife's demand is validly met by a *bona fide* offer to take her back.[6] The wife's claim during the cohabitation is only for necessaries, and the husband is the sole judge as to the style in which they shall live.[7] But the Court may find the husband liable for necessaries for his wife, though he has been unwilling to supply them, *e.g.* the expenses of going to a watering-place recommended by physicians as a course necessary for the wife's health.[8]

731. Where the wife is living apart on account of the husband's misconduct, or with his consent, the husband is liable for necessaries suitable to his position supplied to her.[9] This liability has not been affected by the Married Women's Property Acts. In particular, it is not affected by the provisions of section 3 of the Act of 1920.[10] But the husband is not liable if the wife have sufficient means of her own,[11] or if he pay her a suitable allowance,[12] or one to which she has agreed at the separation,[13] or if she have

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[1] *Maxwell* v. *Maxwell*, 1711, Mor. 423.

[2] *Douglas* v. *Douglas*, 1739, Mor. 425; *Bissets* v. *Bisset*, 1748, Mor. 413; *Dalziel* v. *Dalziel*, 1788, Mor. 450; *Fletcher* v. *Fletcher*, 1696, 4 Br. Sup. 294; *M'Rostie* v. *M'Rostie*, 1818, Hume, 9; Ersk. i. 6, 58, Prin. iii. 1, 4; Fraser, P. & C. 124.

[3] *Strathmore* v. *Strathmore's Trs.*, 1825, 1 W. & S. 402; *Stuart* v. *Court*, 1848, 10 D. 1275; More, Notes on Stair, p. xxxix.

[4] Stair, i. 4, 10; Ersk. i. 6, 19; Fraser, H. & W. i. 836.

[5] 8 & 9 Vict. c. 83, s. 80.

[6] *Arthur* v. *Gourlay*, 1769, 2 Pat. 184; *Hood* v. *Hood*, 1871, 9 M. 454; *Paterson* v. *Paterson*, 1861, 24 D. 215; *Crombie* v. *Crombie*, 1868, 6 M. 776.

[7] Fraser, H. & W. i. 614, and i. 55; *Manby* v. *Scott*, 1660, 1 Mod. 138; 2 Smith's Leading Cases, 9th ed., p. 466; *Waithman* v. *Wakefield*, 1807, 1 Camp., at p. 121.

[8] *Kinfauns*, 1711, Mor. 5882.

[9] Fraser, *l.c.* and i. 848; Ersk. i. 6, 26; *Buie*, 1827, 5 S. 464, and 1831, 9 S. 923; *Bazeley* v. *Forder*, 1868, L.R. 3 Q.B. 559.

[10] 10 & 11 Geo. V. c. 64.

[11] Fraser, i. 639; *Johnston* v. *Sumner*, 1858, 3 H. & N. 261.

[12] See *Auchinleck* v. *Monteith*, 1675, Mor. 5879; *Robins* v. *Southesk*, 1688, Mor. 5955.

[13] *Eastland* v. *Burchell*, 1878, 3 Q.B.D., at 436; *Hunt* v. *De Blaquière*, 1829, 5 Bing. 550.

agreed to support herself.[1] In England it is settled that the wife cannot pledge the husband's credit if she have been guilty of adultery, whether this be known to the tradesmen who supply her or not.[2] In Scotland the point has never been expressly decided in an action by a tradesman. But the general rule is that a husband is liable for his wife's support even if she has been guilty of adultery until he obtains divorce.[3]

732. The mere fact that a wife has made savings out of an alimentary allowance made to her by her husband does not entitle him to reclaim such savings.[4]

Section 8.—Aliment Pendente Lite.

733. Where a wife has raised an action of divorce or separation against her husband, she is not to be expected to continue to live with him during the action. Accordingly, if she have a good case *ex prima facie*, and have no means of her own, an order for interim aliment will generally be granted to her.[5] Where the wife is defender, she is entitled to aliment *pendente lite*, however strong the case against her may appear.[6] But a mandatary for the husband is, apparently, not liable to pay the interim aliment awarded as a condition of insisting in the action.[7] Where a wife has been successful she is entitled to aliment pending an appeal to the Inner House or the House of Lords, and even where decree of divorce has been pronounced against her she will be awarded aliment pending her appeal unless the appeal appears frivolous or vexatious.[8] But a wife who is pursuer of an action of separation and aliment and has been unsuccessful in the Outer House will not as a rule obtain aliment pending a reclaiming note.[9]

734. A wife who is pursuing an action of nullity of marriage will be entitled to aliment *pendente lite* if a ceremony of marriage is proved or admitted, or she had other reasonable grounds for supposing the marriage to be valid.[10] If she is defender in such an action, she is generally entitled to aliment.[11] In an action of declarator of marriage at the woman's instance she will not be awarded interim aliment where the

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[1] *Biffin* v. *Bignell*, 1862, 7 H. & N. 877.

[2] *Govier* v. *Hancock*, 1796, 6 T.R. 603; *Harris* v. *Morris*, 1801, 4 Esp. 41; *Cooper* v. *Lloyd*, 1859, 6 C.B.N.S. 519.

[3] *Logan* v. *Wood*, 1561, M. 5877; *Milne* v. *Milne*, 1901 (O.H.), 8 S.L.T. 375; Fraser, i. 644.

[4] *Davidson* v. *Davidson*, 1867, 5 M. 710; but see *Henry* v. *Fraser*, 1906 (O.H.), 14 S.L.T. 164.

[5] Fraser, i. 851; *Macfarlane* v. *Macfarlane*, 1844, 6 D. 1220, and 10 D. 962; *Borthwick* v. *Borthwick*, 1848, 10 D. 1316, note; *Stuart Brown* v. *Stuart Brown*, 1911 (O.H.), 2 S.L.T. 35.

[6] *Ritchie* v. *Ritchie*, 1874, 1 R. 826; *Montgomery* v. *Montgomery*, 1880, 8 R. 26; *Hoey* v. *Hoey*, 1883, 11 R. 25; *Robertson* v. *Robertson*, 1905 (O.H.), 13 S.L.T. 114; *James* v. *James*, 1908 (O.H.), 15 S.L.T. 732.

[7] *Webster*, 1896, 3 S.L.T. No. 396.

[8] *Ritchie*, *Montgomery*, and *Hoey*, *supra*.

[9] *Bonner* v. *Bonner*, 1911, S.C. 854.

[10] *S.* v. *B.*, 1884, 9 P.D. 80; *Langworthy*, 1886, 11 P.D., at p. 86; *A. D.* v. *W. S.*, (O.H.) 1909, 1 S.L.T. 342; Fraser, i. 153, 154.

[11] *Ballantyne* v. *Ballantyne*, 1866, 4 M. 494; Fraser, i. 850.

alleged husband appears and denies the marriage.[1] But if the alleged husband do not appear she may get an order for aliment if she produce *prima facie* evidence of marriage.[2] Where a woman after the death of her alleged husband obtained decree of declarator in the Outer House the Court made an order for interim aliment against his representative pending a reclaiming-note.[3] The amount of aliment is entirely in the discretion of the Court. As a rule only sufficient will be given to ensure a decent maintenance.

Section 9.—Aliment after Decree of Separation.

735. A wife after decree of separation, even for her own fault, is, as a general rule, entitled to such a yearly aliment as will enable her to live suitably in the station which she occupies in virtue of her husband's position. The amount of aliment is eminently a matter of discretion in the particular circumstances, and the Court will be slow to bind itself by any fixed rules. From one-fourth to one-third of the husband's income is often given. It is very unusual to give more than one-third.[4] The Court will be inclined to accept a sum previously agreed on by the spouses themselves in a contract of voluntary separation.[5] But this amount may be varied on proof of change of circumstances since the contract was made.[6] The amount originally fixed by the Court may also be varied on proof of change of circumstances.[7] A wife who has adequate separate estate is not entitled to aliment.[8] It may be an element for consideration, that the wife is capable of earning money, and has been in the habit of doing so.[9] But the Court will not expect a woman who had never worked for money before the decree, to take to some occupation in order to lessen the burden on the husband.[10]

Section 10.—Aliment after Divorce to Wife who has Custody of Children.

736. A divorced wife has no claim for aliment for herself, and a wife who has divorced her husband has a claim not for aliment, but for her legal or conventional provisions. She is not entitled to aliment even pending an action of reduction of the decree of divorce.[11] But a wife

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[1] *Murison* v. *Murison*, 1923 S.C. 40 ; *Petrie* v. *Petrie*, 1910 S.C. 136.

[2] *Sassen* v. *Campbell*, Jan. 20, 1819, F.C., 1826, 2 W. & S. 309 ; *Browne* v. *Burns*, 1843, 5 D. 1288 ; *Fleming* v. *Corbet*, 1858, 21 D. 179.

[3] *Petrie* v. *Petrie*, *supra*.

[4] *Lang* v. *Lang*, 1868, 7 M. 24 ; *Scott* v. *Scott*, 1894, 21 R. 853.

[5] *Thomson* v. *Thomson*, 1890, 17 R. 1091 ; *Scott*, *ut supra*.

[6] *M'Keddie* v. *M'Keddie*, 1902 (O.H.), 9 S.L.T. 381, per Lord Kyllachy.

[7] *Symington* v. *Symington*, 1874, 1 R. 871 ; *Hay* v. *Hay*, 1882, 9 R. 667 ; *Stewart* v. *Stewart*, 1887, 15 R. 113 ; *Scott*, *ut supra*.

[8] *Pitt* v. *Pitt*, 1861, 24 D. 1444 ; *Macfarlane* v. *Macfarlane*, 1844, 6 D. 1220, and 10 D. 962 ; see *Milne*, 1885, 13 R. 304 ; Fraser, i. 859.

[9] *Goodheim* v. *Goodheim*, 1861, 2 S. & T. 250.

[10] Fraser, i. 860.

[11] *Stewart* v. *Stewart*, 1883, 1 M. 449.

in whose custody the children of the marriage are left is entitled to aliment for them, to be expended in their maintenance and education.[1] If the order is made under the powers given by the Conjugal Rights Act, it falls *quoad* each child when it attains minority.[2] Where the husband's circumstances subsequently improve, the Court may increase the amount of aliment.[3]

Section 11.—Aliment of Widow till First Term after Husband's Death.

737. In a question with her husband's representatives, but not in competition with his creditors, a widow is entitled to aliment from the death of the husband till the first term at which her provisions, legal or conventional, become payable. The theory is that she is entitled to keep up the husband's establishment until the term following his death, and she will, accordingly, get aliment, although she have means of her own,[4] unless the estate is manifestly insolvent.[5] The claim is not renounced by a general clause accepting provisions in lieu of all legal rights,[6] but it is impliedly renounced by acceptance of the liferent of the whole residue of the husband's estate.[7]

Section 12.—Permanent Aliment to Indigent Widow from Husband's Estate.

738. It may happen that a husband dies possessed of considerable estate, and yet that the widow's legal provisions are so small as not to afford her a decent maintenance. In such a case it is in the discretion of the Court to award her an additional aliment.[8] The criterion of the amount of additional aliment to be granted is not the widow's income, but the amount of the total income of the estate.[9] A widow whose husband has died intestate is now entitled to a provision out of his estate irrespective of the character of his investments.[10] The amount of that provision will now have to be taken into account in considering a claim by a widow for additional aliment. If the income of the estate is

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[1] *Dunn* v. *Dunn*, 1842, 4 D. 454; see Conjugal Rights Act, 1861, s. 6.

[2] *Watson* v. *Watson*, 1895, 23 R. 219.

[3] *Rowat* v. *Rowat*, 1904 (O.H.), 12 S.L.T. 449.

[4] *Ormiston*, 1708, Mor. 5909; *Moncrieff*, 1712, Mor. 5915; *M'Intyre* v. *M'Intyre's Trs.*, 1865, 3 M. 1074; *Palmer* v. *Sinclair*, June 27, 1811, F.C.; *Buchanan* v. *Ferrier*, 1822, 1 S. 322 (N.E. 299); Ersk. i. 6, 41; Fraser, ii. 965.

[5] *Barlass* v. *Barlass' Trs.*, 1916 S.C. 741.

[6] *Griffith's Trs.* v. *Griffith*, 1912 S.C. 626; *Palmer* v. *Sinclair*, *ut supra*.

[7] *De Blonay* v. *Oswald's Reps.*, 1863, 1 M. 1147; *Hadaway* v. *Barker*, 1830, 8 S. 800.

[8] *Lowther* v. *M'Guire*, 1786, Mor. 435; Hailes, ii. 1012; *Thomson* v. *M'Culloch*, 1778, Mor. 434; *Harvie* v. *Harvie*, 1828, 6 S. 1144, and 7 S. 305; *M'Conochy*, 1830, 8 S. 604; *Hobbs* v. *Baird*, 1845, 7 D. 492; Fraser, ii. 968; *Thomson*, 1898 (O.H.), 6 S.L.T. 258.

[9] *Howard's Exr.* v. *Howard's Curator Bonis*, 1894, 21 R. 787.

[10] Intestate Husbands' Estate (Scotland) Acts, 1911 and 1919 (1 & 2 Geo. V. c. 10 and 9 Geo. V. c. 9).

insufficient, additional aliment may be awarded out of capital.[1] The Court will not permit the distribution of the estate to be held up to meet a contingent claim by the widow.[2] The claim will be barred by the wife's having accepted a provision under an antenuptial marriage contract;[3] but not by a renunciation in a postnuptial contract if the provision be inadequate.[4] It would seem that an indigent widower has a similar claim.[5]

Section 13.—Liability of Wife to Aliment Children or Husband.

739. A wife with separate estate is bound to aliment her children, if her husband is incapable of doing so.[6] It is thought, however, that she is not bound to contribute to the expenses of the household when the husband's means, though small, are sufficient to supply her and the children with the necessaries of life and that her position in this respect at common law is not affected by the Married Women's Property Act of 1920.[7]

740. By sec. 4 of that statute a wife is now liable to aliment her husband if he is unable to maintain himself and if she have a separate estate or a separate income more than reasonably sufficient for her own maintenance. The measure of the wife's obligation towards her indigent husband is precisely the same as that of the husband towards his wife: an indigent husband may obtain *interim* aliment from his wife in a consistorial action upon the same grounds as it is in use to be awarded to a wife against her husband.[8]

Section 14.—Aliment of Fiar by Liferenter.

741. The Act 1425, c. 25, ordains that, where lands fall in ward or are "*given in conjunct fee or liferent as well to burgh as to land,*" the sheriff shall take surety that the ward superior shall not waste the subjects. The Act further provides, "and an reasonable living to be given to the sustentation of the air, after the quantitie of the heritage, gif the said air has na blanche ferme, nor feu ferme land, to susteine him on, alsweil of the ward lands that fallis to our Soveraine Lordis Lands, as onie uther baronne, spiritual or temporal." By interpreting the last clause as if, like the first, it applied to liferenters as well as to wardatars, it was held in a number of cases [9] that a liferenter is burdened with the support of an heir who has no other means of subsistence. The doctrine

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[1] *Anderson* v. *Grant*, 1899, 1 F. 484.
[2] *Howard's Exrs., supra.*
[3] *Countess of Seafield*, Feb. 8, 1814, F.C.; Ersk. i. 6, 41, note.
[4] *Lee* v. *Bates*, 1840, 3 D. 317.
[5] *Lowther* v. *M'Taine*, 1786, Hailes, ii. 1012; Fraser, ii. 969.
[6] Ersk. i. 6, 56; More, Notes, xxix.; Fraser, P. & C. 100.
[7] 10 & 11 Geo. V. c. 64; see *Fingzies*, 1890, 28 S.L.R. 6; Walton, H. & W., 2nd ed., p. 192; but see Fraser, i. 837.
[8] *Adair* v. *Adair*, 1924 S.C. 798.
[9] Mor. 381–409.

is attacked by Mackenzie,[1] but is not doubted by Erskine.[2] In *Maule* v. *Maule*,[3] it was characterised by L. Redesdale as "the most monstrous misconstruction of an Act that was ever brought under the view of a Court of justice." In addition to the argument on the intention of the Act, is the consideration that the fiar may raise money upon the estate which is vested in him, and is not, therefore, destitute.[4] According to the old decisions, the doctrine never applied to the life-renter of a sum of money;[5] nor to an annuitant;[6] nor where the fiar had renounced the succession and had taken the estate by a singular title;[7] nor after he had sold the land.[8] No attempt seems to have been made to set up the doctrine since *Maule's* case, and it is probably no longer law.[9]

Section 15.—How Payment of Aliment is enforced.

742. The indigent person may bring a direct action against the relative or husband liable. And a parish council, or a person who has supplied necessaries, has, in general, an action of relief. The mother of an illegitimate child can obtain a continuing decree for payment of aliment to be expended. A husband or father who neglects to maintain his wife or children, being able to do so, whereby the wife or child becomes chargeable to a parish, is liable to imprisonment under the Poor Law Act, 1845.[10] And so are the mother of an illegitimate child and its putative father when the paternity has been proved or admitted. The creditor in a sum of aliment decerned for, *e.g.* a woman holding a decree for aliment to be paid by the putative father of her bastard child, may enforce payment of arrears by an application for a warrant to imprison the debtor under the Civil Imprisonment (Scotland) Act, 1882.[11] But a parish council, or a person who has supplied aliment and has obtained a decree for reimbursement against the relative liable, cannot enforce the decree by imprisonment.[12]

Section 16.—Repayment of Aliment.

743. For necessaries supplied to a child not provided for *aliunde*, a direct action lies against the father, and that even though the child was not living in his father's house.[13] And on the same principle a husband

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[1] Observations on Act 1491, p. 101, vol. i. 226 of ed. of 1716.
[2] ii. 9, 62, 63.
[3] 1825, 1 W. & S., at 294.
[4] See *Woolley* v. *Maidment*, 1818, 6 Dow 257.
[5] *Mirrie* v. *Pollocks*, 1731, Mor. 397.
[6] *Stewart* v. *Campbell*, 1780, Mor. 398; Hailes, 861.
[7] *Lyon*, 1712, Mor. 383.
[8] *Sandiland*, 1700, Mor. 385.
[9] Bell, Prin. s. 1065.
[10] 8 & 9 Vict. c. 83, s. 80.
[11] 45 & 46 Vict. c. 42; *Cain* v. *M'Colm*, 1892, 19 R. 813; *Cook* v. *Wallace*, 1889, 16 R. 565. See Imprisonment for Debt.
[12] *Tevendale* v. *Duncan*, 1883, 10 R. 852.
[13] Stair, i. 5, 7; More, Notes, xxix. No. 3; Ersk. i. 6, 57; Fraser, P. & C. 111; *Wallace*, 1672, Mor. 13425; see *Ligertwood* v. *Brown*, 1872, 10 M. 832.

may be sued for the price of necessaries supplied to his wife.[1] A parish council which has given relief has recourse against the person legally bound to maintain the indigent person.[2] Such a claim is essentially one of relief ; and a continuing decree for sums proposed to be expended, such as is granted to the mother of an illegitimate child against its father, will not be pronounced.[3] Where a parent, or relative entitled to do so, applies for a writ or order for the production of a child which has been brought up by a third person or by an institution or a parochial board, the Court, if it orders the child to be given up to the parent, may, in its discretion, order the applicant to pay the whole or part of the costs incurred in the child's upbringing.[4]

744. Where aliment has been furnished *ex pietate*, an action will not lie for its repayment, though the person alimented have subsequently acquired property.[5] Nor can a parish claim reimbursement if a pauper acquires estate.[6] Whether aliment has been given as a donation and *ex pietate*, is a question of fact. The general presumption is that it was given on that footing if the person alimented was a major, or a minor with a curator. For then, if repayment had been contemplated, a bargain might have been made.[7] This presumption extends to persons not liable *ex jure naturæ*.[8] In the case of pupils or minors without curators, if they are brought up by their father or one *in loco parentis*, and have no means of their own, aliment is presumed to be given *ex pietate*.[9]

745. Where the child has estate of its own, the relative alimenting it is entitled to claim repayment of aliment out of the child's income.[10] In the last-named case the opinion was expressed by L. P. Inglis that a father's obligation to maintain his children was so absolute that he could not claim reimbursement. This *dictum*, it is respectfully thought, is not borne out by authority ; and it is submitted that even a father may, as his child's administrator-in-law, apply the rents or interest of the child's estate, up to a reasonable amount, in payment of its maintenance.[11] Without express agreement or authority, it does not seem to be permissible to encroach upon the child's capital for its maintenance.[12]

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[1] Fraser, H. & W. i. 607. [2] Poor Law Act, 1845 (8 & 9 Vict. c. 83), s. 71.

[3] *Den* v. *Lumsden*, 1891, 19 R. 77.

[4] Custody of Children Act, 1891 (54 & 55 Vict. c. 3), s. 2 ; *Soutar* v. *Carrie*, 1894, 21 R. 1050.

[5] *Home* v. *Wedderburn*, 1757, Mor. 412 ; *Drummond* v. *Stewart*, 1756, Mor. 412 ; *Turnbull* v. *Brien*, 1908 S.C. 313 ; but see *M'Gaws* v. *Galloway*, 1882, 10 R. 157.

[6] *Campbell* v. *Macfarlane*, 1885, 12 R. 713.

[7] Stair, i. 8, 2 ; Ersk. iii. 3, 92 ; Fraser, P. & C. 117 ; Dickson on Evidence, s. 163.

[8] *Drummond* v. *Swayne*, 1834, 12 S. 342 ; *Ferguson* v. *M'Gachen*, 1831, 9 S. 472 ; *M'Gaws* v. *Galloway*, *ut supra*.

[9] *Home* v. *Wedderburn*, *ut supra* ; *Guthrie* v. *Mackerston*, 1672, Mor. 10137 ; *Gourlay* v. *Urquhart*, 1697, Mor. 11438 ; *Wilson* v. *Paterson*, 1826, 4 S. 817.

[10] Ersk. i. 6, 56 ; *Fairgrieves* v. *Henderson*, 1885, 13 R. 98.

[11] *Hutcheson* v. *Hoggan's Trs.*, 1904, 6 F. 594.

[12] *Winrahan* v. *Ellis*, 1668, Mor. 11433 ; *Maxwell* v. *Brown*, 1669, Mor. 11435 ; *Irvine*, 1725, Mor. 11433 ; *Menzies* v. *Livingston*, 1839, 1 D. 601 ; *Steele's Trs.* v. *Cooper*, 1830, 8 S. 926 ; *Galt* v. *Boyd*, 1830, 8 S. 332 ; *Fairgrieves*, *ut supra*.

746. When the estate of a pupil child is vested in trustees, they will usually have power under the trust deed to pay income, or part thereof, to the father or other person having the custody of the child, for its maintenance. Where the trustees doubt their power to do this, it is competent for them, or for the father, to present a petition praying the Court to grant the necessary authority, upon such conditions as it may think fit.[1] Authority may be granted for a payment towards aliment out of a prospective share although not vested.[2]

Section 17.—Jurisdiction.

747. The Court of Session has jurisdiction to grant interim aliment to a wife when the spouses are resident but not domiciled in Scotland. This is upon the principle that the wife must not be allowed to starve until her right to live separate can be determined by a competent Court.[3] In England it is now established that residence may be sufficient to confer jurisdiction in an action for separation.[4] It is thought that jurisdiction to grant separation would be sustained in Scotland if the spouses were both resident there otherwise than as mere visitors or travellers, or if the wife were living in Scotland and the husband came here and so acted that she required protection. An action for aliment is not essentially different from any other action for debt, and on principle it seems that jurisdiction should be sustained on the ground of such residence as would be sufficient in an action for debt. Mere presence and citation within the territory is not enough.[5] Nor is a Scottish domicile of origin together with personal citation sufficient.[6] In one case the Court sustained its jurisdiction to grant separation and aliment on the ground that the defender was domiciled in Scotland though resident in England.[7] As regards the aliment this decision is inconsistent with the principle that residence and not domicile determines the jurisdiction in ordinary actions.[8] If this case is well decided, it involves the assertion of the right to decree permanent aliment.

748. In cases as to the aliment of children, legitimate or illegitimate, or of ascendants, the sheriff always had jurisdiction, for no question of status is raised. In cases between husband and wife, the wife's claim generally depends upon her right to live separate from her husband.

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[1] *Scott, Petr.*, 1870, 8 S.L.R. 260; *Stewart's Trs.*, 1871, 8 S.L.R. 367; *Edmiston* v. *Miller's Trs.*, 1871, 9 M. 987; *Seddon*, 1891, 19 R. 101; 1893, 20 R. 675; *Duke of Sutherland, Petr.*, 1901, 3 F. 762.

[2] *Robertson's Trs., Petrs.*, 1909 S.C. 236.

[3] Fraser, ii. 1295; per L. Mackenzie in *Ringer* v. *Churchill*, 1840, 2 D., at 316; Walton, H. & W., 2nd ed., p. 378.

[4] *Le Mesurier* v. *Le Mesurier*, [1895] A.C., per Lord Watson, 527 and 531; *Christian* v. *Christian*, 1897, 78 L.T. 86; *Armytage* v. *Armytage*, [1898] P. 178; *Eckhardstein* v. *Eckhardstein*, 1907, 23 T.L.R. 364 and 359; *Anghinelli* v. *Anghinelli*, [1918] P. 247.

[5] *M'Neill* v. *M'Neill*, (O.H.) 1919, 2 S.L.T. 127.

[6] *Tasker* v. *Grieve*, 1905, 8 F. 45.

[7] *Hood* v. *Hood*, 1897, 24 R. 973.

[8] *Buchan* v. *Grimaldi*, 1905, 7 F. 917; *Tasker* v. *Grieve*, *supra*.

This is a consistorial question, and the power of the sheriff was formerly limited to making an interim award pending its determination by the Court of Session. Now, by the Sheriff Courts (Scotland) Act, 1907,[1] the sheriff's jurisdiction extends to "Actions of Aliment, or of Separation and Aliment." On cause shown or *ex proprio motu* the sheriff may at any stage remit to the Court of Session any action of separation and aliment.

Section 18.—Prescription.

749. The triennial prescription applies to a claim against a father for aliment afforded to his child under a contract;[2] but the statute does not apply to the claim by the mother of an illegitimate child for a contribution to aliment.[3]

Section 19.—Aliment in Bankruptcy Law.

Subsection (1).—*Aliment to Bankrupt.*

750. Under the Bankruptcy (Scotland) Act, 1913,[4] the creditors on a sequestrated estate may, by a majority of four-fifths in value present at the meeting, authorise payment of an allowance to the bankrupt from the estate (s. 74). This may be done either at the meeting for election of the trustee, or at the meeting held after the bankrupt's examination, or at any meeting called for the purpose (*ibid.*). The maximum is £3, 3s. per week (*ibid.*). The duration of the allowance is until the period assigned by the Act for the second dividend, namely, ten months after the first deliverance (ss. 74, 127). Where the sequestration is that of a partnership, an allowance may be made to each partner. It is essential to the validity of an allowance that the bankrupt shall have complied with the provisions of the Act. A special and additional allowance may be made by the Lord Ordinary on the Bills or the Court, on application by the trustee, provided that a majority of the creditors present at a meeting have resolved that it is for the interest of the estate, and that the Accountant of Court has reported in favour of it. The Act does not assign any limit to this special allowance, either in respect of duration or amount. The creditors cannot sanction the employment of the bankrupt to discharge duties falling within the scope of the ordinary management of the trustee.[5]

Subsection (2).—*Alimentary Debts and Funds.*

751. An obligation for a periodical alimentary payment falls to be valued and ranked for in the sequestration.[6] A claim by the mother

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[1] 7 Edw. VII. c. 51, s. 5.

[2] *Ligertwood* v. *Brown*, 1872, 10 M. 832; *Wilson*, 1908, 15 S.L.T. 948.

[3] *Ligertwood, ut supra*; *Thom* v. *Jardine*, 1836, 14 S. 1004; *Thomson* v. *Westwood*, 1842, 4 D. 833.

[4] 3 & 4 Geo. V. c. 20.

[5] *Turner* v. *Wilson*, 1822, 1 S. 444, N.E. 477.

[6] *Downs* v. *Wilson's Tr.*, 1886, 13 R. 1101; *Webster*, 1886, 24 S.L.R. 67.

of an illegitimate child for aliment against the father is valued and ranked as a contingent claim under s. 49 of the Bankruptcy Act, 1913.[1] It is not settled how far alimentary debts, or debts arising *ex jure naturæ*, are affected by the debtor's discharge in bankruptcy.[2] Alimentary funds belonging to a bankrupt do not pass to the trustee in sequestration.[3] But if the fund exceeds a reasonable provision, taking into account the bankrupt's circumstances in life, it is, to the extent of the excess, available to his creditors, and may be claimed by the trustee. See ALIMENTARY INTEREST.

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[1] *Downs, ut supra.*

[2] *Marjoribanks* v. *Amos*, 1831, 10 S. 79 ; *Downs, ut supra* ; see *Tulloch* v. *Pollock*, 1847, 9 D. 582.

[3] Bell, Com. i. 124–5 ; Goudy on Bankruptcy, 402, 502.

ALIMENTARY INTEREST.

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Section 1.—Preliminary.

752. Where it is desired to protect a beneficiary against his own improvidence, this can be done subject to certain conditions by declaring the interest of the beneficiary in an estate to be alimentary.

Section 2.—Necessity of continuing Trust.

753. The estate must be vested in trustees, who must be independent of the beneficiary.[1] Doubts as to the necessity of a trust have been expressed by Lord Skerrington,[2] and it has been suggested that a dictum of Lord Dunedin confined the necessity to the case of moveables,[3] but the point was held as concluded by authority in *Forbes' Trs.*[4] A direct gift of a capital sum, with a declaration that the interest of the donee therein shall be only alimentary, is held to be an unconditional gift of the capital. A donor cannot derogate from his gift, and the condition expressly attached to the gift is therefore held void for repugnancy.[5] Where the alimentary condition is attached to a beneficial interest in an estate vested in trustees, it prevents the beneficiary assigning his interest by anticipation for other than alimentary considerations, and the fund, which is the source of the alimentary interest, is protected by the title of the trustees from dissipation. A lady who was in right of an alimentary liferent under her father's trust settlement, conveyed to her marriage-contract trustees her whole estate for payment of the liferent to her, and after her death to her husband. These liferents were declared to be alimentary. It was held that her conveyance did not carry her liferent under her father's settlement, and that she was entitled to demand direct payment.[6]

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[1] *M'Callum* v. *M'Culloch's Trs.*, 1904, 7 F. 337.

[2] *Dunsmure's Trs.* v. *Dunsmure*, 1920, S.C. 147; *Dempster's Trs.* v. *Dempster*, 1921, S.C. 332, per Lord Skerrington.

[3] *M'Dougal's Trustee* v. *Heinemann*, 1918, S.C. (H.L.) 6, per Lord Dunedin.

[4] *Forbes' Trs.* v. *Tennant*, 1926, S.C. 294.

[5] *Wilkie's Trs.* v. *Wight's Trs.*, 1893, 21 R. 199; *Watson's Trs.* v. *Watson*, 1913, S.C. 1133.

[6] *Neilson's Trs.* v. *Henderson*, 1897, 24 R. 1135.

754. " It has long been settled that the Court will not supply the means for restricting the rights of legatees. If there is a trust constituted for the special purpose, and the trust fails, the Court will supply the deficiency by the appointment of new trustees or a judicial factor, but the Court will not set up a trust to protect a legatee against himself, unless it is clear that the settler has directed the constitution of such a trust." [1] Thus trustees were directed to apply part of residue in the purchase of an annuity to a legatee for her " present support and subsistence only," it being neither assignable nor subject to the diligence of creditors, and there was no provision for a continuing trust. It was held that the legatee was entitled to payment in money of the share of residue.[2]

Section 3.—Use of Special Words unnecessary.

755. For the purpose of rendering the interest of the beneficiary unassignable in anticipation by him, and unattachable by the diligence of his ordinary creditors, the use of the word alimentary, without any qualification, has been held to be quite sufficient, it being a word " which, according to high authority, has a very comprehensive effect." [3] The word " alimentary " is not, however, necessary, nor are any special terms of art, if the purpose of the truster be sufficiently declared,[4] nor is it necessary that there should be the expression of an intention that the liferent should be used for subsistence only, provided there is an exclusion of the liferenter's acts and deeds and the diligence of his creditors.[5]

Section 4.—Powers of Grantee.

756. Where the interest is declared alimentary, the qualification operates as a conventional incapacity of the beneficiary, restraining him from, by depriving him of, the power of assigning, either gratuitously or onerously, his interest, as far as unrealised. It is only the prospective assignation that is struck at. " An alimentary annuity cannot be validly assigned, but each term's annuity, when reduced into possession, is, of course, at the absolute disposal of the owner." [6] This conventional incapacity of an alimentary beneficiary prevents him discharging his interest by anticipation and so bringing to an end the trust administration. The rule has " long been settled " that " the combined action of all parties interested cannot defeat the settler's intention to make the

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[1] *Murray* v. *Macfarlane's Trs.*, 1895, 22 R. 927, per Lord M'Laren, at 941.

[2] *Kennedy's Trs.* v. *Warren*, 1901, 3 F. 1087; cf. *Brown's Tr.* v. *Thom*, 1916, S.C. 32; *Dempster's Tr. supra*; *Turner's Trs.* v. *Fernie*, 1908, S.C. 883; *Tod* v. *Tod's Trs.*, 1871, 9 M. 728.

[3] *Reliance, etc., Society* v. *Halkett's Factor*, 1891, 18 R. 615, per Lord M'Laren, at 622.

[4] *Chambers's Trs.* v. *Smith*, 1875, 5 R. (H.L.) 151, per Lord Hatherley, at 156, and per Lord Blackburn, at 163; *cp.* expressions in *Nairn & ors.* (*Thomson's Trs.*), 1893, 1 S.L.T., No. 65.

[5] *Dewar's Trs.* v. *Dewar*, 1910, S.C. 730.

[6] *Hewats* v. *Robertson*, 1881, 9 R. 175, per L. J.-C. Moncreiff, at 181.

annuitant's right alimentary, a result which cannot be attained except by continuing the trust." [1] Even when the alimentary beneficiary becomes vested in the beneficial right to the fee on which his alimentary interest is a burden, the incapacity still remains, and he cannot do more than appoint the fee.[2] He may make this appointment, however, for a present consideration, and so improve his position financially during his lifetime.[3]

757. A fee burdened with an alimentary interest has been released from the trust administration, on the alimentary interest being made a real burden on the fee, and the real burden so created being held in trust for the alimentary beneficiary [4] (*cp.* transfer of Government annuity to trustees [5]). The distinguishing feature of this arrangement is the retention of the alimentary interest in the hands of the trustee.[6] It is a moot question whether an alimentary interest can be discharged with the consent of the truster (see discussion in *Eliott's Trs.*, cit.), but where a wife provided funds by antenuptial contract of marriage to be held as an alimentary provision for her husband it was held that she could not revoke the restriction by her trust-disposition and settlement.[7]

Section 5.—Persons entitled to constitute Provision.

758. The trust must be constituted by another than the alimentary beneficiary.[8] "I know of no authority or precedent," says L. J.-C. Moncreiff, "either here or in England, for holding that a man of full age and *sui juris* can put his property out of his power, and beyond the reach of his creditors, without constituting at the same time some right, direct or contingent, in regard to that property in another." [9] The only exception is the case where a woman, under her antenuptial marriage contract, creates an alimentary interest in her own favour in property derived from herself.[10] Such an interest is protected by the marriage contract, but probably only *stante matrimonio*. It is doubtful whether the same protection applies to a similar provision in a post-nuptial contract, for such a provision might be revoked by the joint act of the spouses.[11] The clause, however, must be so expressed as clearly to show its purpose to be alimentary and unassignable.

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[1] *Hughes* v. *Edwardes*, 1892, 19 R. (H.L.) 33, per Lord Watson, at 35; cp. *Cosens* v. *Stevenson*, 1873, 11 M. 761; *Sanders* v. *Sanders' Trs.*, 1879, 7 R. 157.

[2] *Barron* v. *Barron's Trs.*, 1887, 24 S.L.R. 735; *Duthie's Trs.* v. *Kinloch*, 1878, 5 R. 858; *Millar* v. *Millar's Trs.*, 1907, 45 S.L.R. 6; *Howat's Trs.* v. *Howat*, 1922, S.C. 506.

[3] *Eliott's Trs.* v. *Eliott*, 1894, 21 R. 975, per L. J. C. Macdonald, at 979.

[4] *Munro* v. *Macarthur*, 1878, 16 S.L.R. 126.

[5] *Graham's Trs.* v. *Graham's Trs.*, 1898, 1 F. 357.

[6] *White's Trs.* v. *White*, 1877, 4 R. 786; *Smith* (*Petitioner*), 1873, 10 S.L.R. 433.

[7] *Main's Trs.* v. *Main*, 1917, S.C. 660.

[8] *Moncreiff* (*Murray's Trs.*), 1900, 8 S.L.T. 228, and cases cited there by Lord Kincairney.

[9] *Hamilton's Trs.* v. *Hamilton*, 1879, 6 R. 1216, at 1221; *Corbet* v. *Waddell*, 1879, 7 R. 200.

[10] *Douglas Gardiner & Mill* v. *Mackintosh's Trs.*, 1916, S.C. 125; *Menzies* v. *Murray*, 1875, 2 R. 507.

[11] *Gillon's Trs.* v. *Gillon*, 1903, 5 F., at 538–9.

Section 6.—Provision must be reasonable in Amount.

759. An interest is only protected by the alimentary qualification in so far as it is a reasonable allowance for aliment in the circumstances. "It is fixed in our law," says L. Mackenzie, "that a party can make an alimentary provision not alienable. But there must be some limit to this power. A party cannot leave to another £20,000 a year, and render it inalienable by calling it alimentary." [1] Examples of sums held to be inordinate alimentary allowances will be found in the cases undernoted.[2]

Section 7.—Effect of Bankruptcy of Grantee.

760. Owing to the nature of the beneficiary's interest in the fund, it does not pass on his bankruptcy to his trustee in bankruptcy. His alimentary creditors have an exclusive claim to it, in so far as the interest is properly alimentary.[3] The trustee in bankruptcy can only acquire the beneficiary's interest in the alimentary fund by buying up the claims of the strictly alimentary creditors.[4] On the other hand, what is in excess of a proper alimentary interest falls into the hands of the trustee in bankruptcy.[5]

Arrears of an alimentary annuity can be claimed with interest, except in a question with the truster's creditors where the claim is limited to strictly alimentary debts incurred on the faith of the annuity.[6]

Section 8.—Liability to Diligence.

761. It has never been held that an alimentary interest is adjudgeable so as to attach future payments even where the income of the fund is much more than sufficient for alimentary maintenance.[7] An alimentary provision, however, as it becomes payable, may be arrested for an alimentary debt, even where that debt has been incurred prior to the period for which the current alimentary provision is due.[8] The order of preference in which the alimentary fund is to be drawn on is (first) for the current alimentary debts, (secondly) for arrears of alimentary debts, and (thirdly) for payment to the ordinary creditors. A claim by the beneficiary that a sum of ready money should be retained for his current expenses would perhaps, however, take precedence over all other claims.[9]

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[1] *Patersons* v. *Paterson*, 1849, 21 Sc. Jur. 125, at 127.

[2] *Hamilton's Trs.* v. *Hamilton*, 1879, 6 R. 1216; *Livingstone* v. *Livingstone*, 1886, 14 R. 43; *Haydon* v. *Forrest's Trs.*, 1895, 3 S.L.T. 182; *Claremont's Trs.* v. *Claremont*, 1896, 4 S.L.T. 144.

[3] *Thomson* v. *Thomson*, 1905, 13 S.L.T. 245.

[4] *Corbet* v. *Waddell*, 1879, 7 R. 200, per Lord Shand, at 211.

[5] Ersk. iii. 5, 2, and iii. 6, 7.

[6] *Ewing's Trs.* v. *Mathieson*, 1901, 9 S.L.T. 308; *Muirhead* v. *Miller*, 1877, 4 R. 1139.

[7] *Cuthbert* v. *Cuthbert's Trs.*, 1908, S.C. 967, per Lord M'Laren, at 971.

[8] *Lord Ruthven* v. *Pulford & Sons*, 1909 S.C. 951.

[9] *Ibid.*, per Lord M'Laren, p. 954; *Baird* v. *Baird* (O.H.), 1910, 1 S.L.T. 95.

Section 9.—English Law.

762. The law of England does not recognise any alimentary restriction in favour of a person *sui juris* attached to an interest under a trust. The restraint on anticipation in favour of a married woman's separate estate is a special exception, made with an analogous object, but not having the same effect. The English Court, however, does not regard such a restriction as against the public policy of its law, and therefore does not disregard it where the interest of a domiciled Englishman in a Scotch trust is so restricted, but will enforce the restriction against his creditors.[1]

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[1] *In re Fitzgerald*, [1904] 1 Ch. 573.

ALIOQUI SUCCESSURUS.

See SUCCESSION.

ALKALI WORKS.

See NUISANCE.

ALLEGIANCE.

See ALIENS; CONSTITUTIONAL LAW; CRIME; OATHS.

ALLIES, FIGHTING AGAINST THE KING'S.

See CRIME.

ALLODIAL.

See PROPERTY.

ALLONGE.

See BILL OF EXCHANGE.

ALLOTMENT OF SHARES.

See COMPANY.

ALLOTMENTS.

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Section 1.—Preliminary.

763. The statute law regarding allotments is contained in the Allotments (Scotland) Acts, 1892 to 1922, viz. : The Allotments (Scotland) Act, 1892 ; [1] The Local Government (Scotland) Act, 1894,[2] Part IV. ; The Land Settlement (Scotland) Act,[3] 1919, Part III. ; and The Allotments (Scotland) Act, 1922.[4] The later of these Acts repeal great parts of the earlier Acts. The Act of 1925 [5] does not apply to Scotland.

764. The scope of the 1892 Act was limited to the provision of allotments for the labouring population. This limitation has now been repealed (1919 Act, Sched. IV.), and all classes are now eligible as allotment holders. The Acts confer various powers and duties on local authorities. The expression "local authority" in the Acts means in a burgh the town council or police commissioners, and elsewhere than in a burgh the parish council (1892 Act, s. 15, amended by 1919 Act, Sched. III.).

Section 2.—Duty of Local Authority.

765. In the case of all burghs whose populations at the last census (1922 Act, s. 19 (1)) exceeded 10,000, an allotments committee must be established, unless exemption is obtained from the Board of Agriculture : this committee must comprise holders of allotment gardens in addition to members of the council (1922 Act, s. 9). If six electors or ratepayers in a burgh or parish make a representation to the local authority that it is the duty of the authority to take proceedings under the Acts, the authority must take such representation into consideration, and, if they are of opinion that there is a demand for allotments, they must by purchase or lease acquire any suitable land which may be available within or without their area adequate to provide a sufficient number of

[1] 55 & 56 Vict. c. 54. [2] 57 & 58 Vict. c. 58. [3] 9 & 10 Geo. V. c. 97.
[4] 12 & 13 Geo. V. c. 52. [5] 15 & 16 Geo. V. c. 61.

allotments. They will then let these allotments to applicants (1892 Act, s. 2). The provision that the local authority must first be satisfied that allotments cannot be obtained by voluntary arrangement has been repealed (1922 Act, Sched. I.). In the case of burghs whose population exceeds 10,000, the town council's obligation is limited to the provision of allotment gardens not exceeding 20 poles (1922 Act, s. 12). A local authority is not to take proceedings under the Acts unless in their opinion the expenses to be incurred (other than certain specified expenses) may reasonably be expected to be defrayed out of receipts (1922 Act, s. 16). The 1922 Act also makes provision for gardens being let to allotment holders by associations (ss. 1 (2) ; 2 (4), (11)).

Section 3.—Size of Allotments.

766. With regard to allotments constituted under the 1892 Act, it is provided that one person shall not hold any allotment or allotments exceeding 1 acre, and an allotment shall not be sublet (1892 Act, s. 7 (3)). The 1922 Act provides (s. 6 (1)) that when an authority acquires land on lease they may let allotments exceeding 1 acre, but, if the land is taken on lease compulsorily, an allotment must not exceed (*a*) 4 acres of pasture, (*b*) 1 acre of arable and 3 acres of pasture, or (*c*) £4 in annual value. The Act also makes provision for smaller holdings termed "allotment gardens": this expression means an area not exceeding 40 poles wholly or mainly under crops for the occupier's own consumption and not let to him during his employment by the landlord or let along with a dwelling-house (1922 Act, s. 19 (1)). An allotment garden may not be sublet, and one person may only occupy two or more such gardens if their aggregate extent does not exceed 40 poles (1922 Act, s. 5). The Act also provides for a local authority acquiring common pasture provided that land compulsorily leased for this purpose shall not exceed 20 acres (1922 Act, s. 7).

Section 4.—Provision of Land for Allotments.

Subsection (1).—*Purchase.*

767. An authority may obtain land by purchase or on lease. If land is purchased by agreement, certain provisions of the Lands Clauses Acts apply (1892 Act, s. 3 (1)). If the authority proposes to purchase land compulsorily they may apply to the Board of Agriculture for an order providing for the compulsory acquisition of the land (1922 Act, s. 8 (3)). The Board shall not make an order for purchasing land required for the amenity of a dwelling-house or required by a railway company, and shall avoid taking an undue or inconvenient quantity of land from any one owner (1892 Act, s. 3 (5), as amended by 1919 Act, Sched. III.). Procedure in obtaining such an order is regulated by the 1919 Act, Sched. I., as amended by the 1922 Act, Sched. II.

Subsection (2).—*Lease.*

768. If the authority lease land by agreement they shall not break up permanent pasture unless authorised to do so by their lease or by the Board of Agriculture, and the landlord may resume the land if required for mining or feuing on twelve months' notice and on paying compensation (1922 Act, s. 6 (1)). If land is leased compulsorily the lease shall be for not less than ten, and not more than thirty-five years, and shall not include any mines or minerals, and compensation will be payable at the end of the tenancy for improvement or for depreciation as the case may be (s. 6 (2)). A local authority may not lease land already occupied as a small holding (s. 6 (3)). Procedure in obtaining an order for compulsory leasing is similar to that in obtaining an order for compulsory purchase (1922 Act, s. 8 (3)).

Subsection (3).—*Other Methods.*

769. In addition to the above methods of obtaining land, an authority may use land belonging to them which is not immediately required for the purpose for which it was acquired (1919 Act, s. 21) ; or may lease from the Board of Agriculture land acquired by them for small holdings (1922 Act, s. 14) ; or may take possession of unoccupied land on the terms provided by the statute (1922 Act, s. 10).

Section 5.—Administration.

770. Having obtained land for allotments, the local authority may improve it and adapt it for letting by draining, fencing, etc. (1892 Act, s. 5), and shall provide suitable access and regulate such access by regulations (1922 Act, s. 15). The authority may from time to time make such regulations as are necessary for regulating the terms on which the allotments are to be let, and may appoint allotment managers (1892 Act, s. 6). When the rent is under 10s. per annum leases require no stamp (1919 Act, s. 22 (3)). The authority is required to keep a register shewing particulars of allotments let and unlet, and also to make up accounts each year. The register and accounts must be open to examination (1892 Act, s. 14).

Section 6.—Finance.

771. Provision is made for the authority borrowing money (1922 Act, s. 18), for expenses incurred by a town council being defrayed out of the public health general assessment (1919 Act, s. 18 (2)), for the local authority being entered as occupiers in the valuation roll if they so require (1922 Act, s. 17), and for a sum not exceeding £4000 in any one year being spent on allotments out of the Agriculture (Scotland) Fund (1919 Act, s. 18 (3)).

Section 7.—Stock and Implements.

772. A local authority may sell to holders of allotment gardens, whether these be provided by the authority or not, fruit trees, seeds, plants, fertilisers, or implements, or may hire out implements, if facilities for such purchase or hire from a co-operative society are inadequate (1919 Act, s. 22 (1)).

Section 8.—Building.

773. Under the 1892 Act a tenant may erect on his allotment a tool-house, shed, greenhouse, fowl-house, or pigsty, but no other building (s. 7 (5)). When land is acquired on lease by a local authority they may permit the tenant of an allotment (but not of an allotment garden) to erect a stable, byre, or barn (1922 Act, s. 6 (1) (*b*)).

Section 9.—Termination of Tenancy.

774. The Acts contain elaborate provisions regarding the termination of tenancies of allotment gardens (1922 Act, ss. 1, 2), but contain few provisions regarding the termination of tenancies of allotments. An allotment may fall within the definition of an agricultural holding (see Agricultural Holdings Act), in which case the provisions of the Agricultural Holdings (Scotland) Act, 1923, regarding the termination of tenancy, compensation, etc., will apply. The Allotments Acts seem to contemplate these provisions being applicable (see 1892 Act, s. 8 (2); 1922 Act, ss. 2 (7), 6 (2)). The 1892 Act provides that the regulations made by a local authority shall provide for reasonable notice of termination of tenancy being given to tenants of allotments. A tenancy may be terminated if the tenant fails to pay rent or to obey the local authority's regulations, and the tenant will in that case receive compensation (1892 Act, s. 8 (2)), or, in the case of land held on lease by the local authority, if the landlord resumes the land let (1922 Act, ss. 6 (1) and 11). On the termination of his tenancy the tenant may remove fruit trees and bushes (1892 Act, s. 7 (6); 1922 Act, s. 4).

775. The tenancy of an allotment garden can, in general, be terminated by six months' notice, expiring between 1st November and 1st May: this enables tenants to gather the crops which they have grown (1922 Act, s. 1 (1) (*a*)). An allotment garden can be resumed at any time on the notices set out in the Act if the land is required for building, mining, or industrial purposes, of if required by a public undertaking, or on account of any irritancy incurred or breach of regulations by the tenant (1922 Act, s. 1 (1)). The tenant may remove fruit trees or bushes planted by him, and any erection, fencing, or other improvement made by him, but he is not entitled to any compensation except in a case where his tenancy terminates between 1st May and 1st November.

ALLUVIO. ALVEI MUTATIO.

See PROPERTY.

ALTERATION OF DOCUMENTS.

See CRIME; DEED; WILL.

ALTERNATIVE HOLDING.

See CHARTER; DISPOSITION.

ALTIUS NON TOLLENDI.

See SERVITUDE.

AMBASSADOR.

See INTERNATIONAL LAW.

AMBIGUITY.

See DEED; WILL.

AMENDMENT.

TO MOTION. *See* MEETINGS; PARLIAMENT.
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OF RECORD. *See* ACTION; PROCEDURE.

A MENSA ET THORO.

See JUDICIAL SEPARATION.

AMICUS CURIAE.

See PROCEDURE.

AMMUNITION.

See ARMED FORCES; CRIME; RAILWAY.

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AMUSEMENTS.

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ANATOMY ACTS.

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ANCIENT MONUMENTS.

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Section 1.—Introduction.

776. The following are the statutes in chronological order dealing with this subject and applicable to Scotland, viz.—Ancient Monuments Protection Act, 1882 [1]; Ancient Monuments Protection Act, 1900 [2]; Ancient Monuments Protection Act, 1910 [3]; Ancient Monuments Consolidation and Amendment Act, 1913.[4]

The 1913 Act repeals the whole of the prior Acts with the exception of the schedule to the 1882 Act, which contains a list of ancient monuments to which that Act applied. Provision is made in the 1913 Act (s. 24), that (1) any document referring to any Act or enactment thereby repealed is to be construed as referring to the 1913 Act or the corresponding enactment thereof. (2) Anything done under any Act thereby repealed is for the purposes of the 1913 Act to be deemed to have been done thereunder.

Section 2.—Definitions.

777. The Act (s. 22) defines "monument" as including "any structure or erection, other than an ecclesiastical building, which is for the time being used for ecclesiastical purposes; and the expression 'ancient monument' includes any monument specified in the schedule to the Ancient Monuments Protection Act, 1882, and any other monuments or things which, in the opinion of the Commissioners of Works, are of a like character, and any monument or part or remains of a monument, the preservation of which is a matter of public interest by reason of the historic, architectural, traditional, artistic, or archæological interest attaching thereto, and the site of any such monument, or of any remains thereof; and any part of the adjoining land which may be required for the purpose of fencing, covering in, or otherwise preserving the monument from injury, and also includes the means of access thereto." The expression "local authority" used in the Act includes county councils and the councils of Royal or Parliamentary burghs (s. 21 (1)).

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[1] 45 & 46 Vict. c. 73.
[2] 63 & 64 Vict. c. 34.
[3] 10 Edw. VII. c. 3.
[4] 3 & 4 Geo. V. c. 32.

Section 3.—Acquisition of Monuments.

778. The Commissioners of Works, with consent of the Treasury or any local authority, may purchase by agreement any monument which appears to them to be an "ancient monument," and which, in the case of a local authority, is situate in, or in the vicinity of, their area. For the purpose of such purchases the Lands Clauses Acts are incorporated with the Act (s. 1). Any person may, by deed or will, give, devise, or bequeath to the Commissioners or to a local authority all such estate or interest in any ancient monument as he may be seised or possessed of (s. 2).

Section 4.—Guardianship of Monuments.

779. The owner of any monument which appears to the Commissioners or to a local authority to be an "ancient monument," and is, in the case of an authority, situate in, or in the vicinity of, their area may, with consent of the Commissioners or the authority, constitute them by deed guardians of the monument. Exception is made of any structure occupied as a dwelling-house by any person other than the caretaker thereof or his family. Every person deriving title to any monument from, through, or under any owner who has so constituted guardianship, shall be bound by the deed executed by the owner for that purpose. Where the owner of any land being the site of a monument is a tenant for life or heir of entail in possession having a power of sale of the land under a will or settlement or Act of Parliament, the deed executed by the owner in respect of the site shall bind every successive owner of any estate or interest in the land. The execution of any such deed by the tenant for life or heir of entail in possession shall not render him subject to any liability on account of any depreciation of property attributable thereto. Where the site of a monument is, at the time of execution of the deed, subject to any incumbrance not capable of being overreached by the tenant for life under the powers conferred on him by the instrument creating the settlement, the deed shall not bind the incumbrancer. Except as provided by the Act, the owner's right and title to, and estate and interest in, a monument is not to be affected by such guardianship (s. 3).

780. Where the Commissioners or a local authority become guardians of a monument, they shall (until they receive notice in writing to the contrary from any owner of the monument who is not bound by the deed constituting them guardians) maintain the monument and have access by themselves, their inspectors, agents, or workmen to the monument for the purpose of inspection and maintenance. "Maintenance" includes the fencing, repairing, and covering in of a monument, and the doing of any other act or thing which may be required for the purpose of repairing the monument or protecting it from decay or injury, and "maintain" is to be construed accordingly. All expenses incurred by the Commissioners in maintaining the monument are, subject to

the approval of the Treasury, defrayed out of moneys provided by Parliament (s. 4).

781. The following persons are defined as owners of monuments: (*a*) Any person entitled for an estate in fee to the possession or receipt of the rents and profits of any freehold or copyhold land; (*b*) Any person absolutely entitled in possession to a beneficial lease of land of which not less than forty-five years are unexpired; but no lease shall be deemed to be a beneficial lease if the rent reserved thereby exceeds one-third of the full annual value of the land demised by the lease; (*c*) Any person entitled under any existing or future settlement, for the term of his own life or the life of any other person, to the possession or receipt of the rents and profits of land of any tenure, in which the estate for the time being, subject to the trusts of the settlement, is an estate for lives or years renewable for ever, or an estate renewable for a term of not less than sixty years, or an estate for a term of years of which not less than sixty are unexpired, or any greater estate; (*d*) Any body corporate, any corporation sole, any trustees for charities, and any commissioners or trustees for ecclesiastical, collegiate, or other public purposes, entitled, in the case of freehold or copyhold land, in fee, and in the case of leasehold land to a lease for an unexpired term of not less than sixty years. "Entitled" means beneficially entitled; "lands" means land which is the site of an ancient monument, whether the land is or is not subject to incumbrances. Where the "owner" is a minor or of unsound mind, the guardian or committee or, in Scotland, the tutor or curator of that person shall be the "owner," and where the "owner" is a married woman she shall have power to execute a deed constituting the Commissioners or a local authority guardians notwithstanding that she is restrained from anticipation (s. 5.).

Section 5.—Protection of Monuments.

782. If the Ancient Monuments Board (see *infra*) report to the Commissioners that any monument is in danger of destruction or removal or damage from neglect or injudicious treatment, and that its preservation is of national importance, the Commissioners (if they think fit, and if the monument appears to be an "ancient monument") may make a "Preservation Order," placing the monument under their protection. An order may be made by the Commissioners without such a report, if they consider the matter of immediate urgency. Where the Board have reason to believe that any monument is in danger and that its preservation is of national importance, they may enter, at any reasonable time, any premises for the purpose of enabling them to determine by inspection of the monument whether it is proper for them to report to the Commissioners; but unless the Board consider the inspection a matter of immediate urgency, they must give not less than seven clear days' notice to the occupier of the premises of their intention so to enter.

783. A Preservation Order has effect for eighteen months after its date, but thereafter ceases to have effect unless confirmed by Parliament. If it is not confirmed within eighteen months, no further order shall be made with reference to the same monument until five years have elapsed from the date on which the order which has ceased to have effect was made. The Commissioners may bring in a Bill to confirm any Preservation Order, and if (while the Bill is pending in either House of Parliament) a petition is presented against the order, the Bill (so far as it relates to the order) may be referred to a select committee or (if the two Houses of Parliament think fit) to a joint committee of those Houses, and the petitioner may appear and oppose as in the case of a private Bill. Where the Committee report by a majority that a petitioner against the Bill has been unreasonably subjected to expense, or has been subjected to an unreasonable amount of expense in defending his right proposed to be interfered with by the Bill, they may award costs against the Commissioners, to be taxed and recovered in accordance with the Parliamentary Costs Act, 1865 [1] (s. 6).

784. While a Preservation Order is in force, the monument to which the order relates shall not be demolished or removed, nor shall any additions or alterations be made thereto, or any work carried out in connection therewith except with the written consent of the Commissioners. If, while the order is in force, it appears to the Commissioners that, owing to the neglect of the owner of the monument, the latter is liable to fall into decay, they may, with consent of the Treasury, make an order constituting themselves guardians of the monument so long as the Preservation Order is in force, to the same effect as if they had been constituted guardians by virtue of a deed executed by the owner. Any such order may be revoked at any time by the Commissioners (s. 7). Any structure which appears to the Commissioners to be occupied as a dwelling-house (otherwise than by a person employed as a caretaker or his family) is excepted from the foregoing provisions with regard to protection (s. 8).

785. The protection of an ancient monument is a reasonable purpose for which to authorise the landlord to resume possession of a small holding.[2]

Section 6.—Preservation of Monuments.

786. The Commissioners or local authority may receive voluntary contributions towards the cost of the maintenance and preservation of any monument of which they may become the owners or guardians, and may enter into any agreement with the owner of any such monument or with any other person as to the maintenance and preservation of the monument and the cost thereof (s. 9). The Commissioners and any local authority may, in respect of any monument of

[1] 28 Vict. c. 27.

[2] Small Landholders (Scotland) Act, 1911, 1 & 2 Geo. V. c. 49, s. 19.

which they are owners or guardians (but where guardians only with consent of the owner of the monument), enter into and carry into effect any agreements for the transfer from the Commissioners to the local authority, or *vice versa*, or from one local authority to another, of the monument or of any estate or interest therein, or of the guardianship (s. 10).

787. Any local authority may, at the request of the owner, undertake or contribute towards the cost of preserving, maintaining, and managing any monument which appears to them to be an "ancient monument" and is situate in, or in the vicinity of, their area, whether they have purchased the monument or become guardians of it or not. In such cases the plans and specifications of all works (other than those of immediate necessity) to be undertaken or contributed by the local authority shall be submitted to the Ancient Monuments Board, who, if they object to any plans or specification, shall report to the Commissioners, whose decision shall be final (s. 11).

788. The Commissioners are to cause to be prepared and published from time to time a list containing : (*a*) Such monuments as are reported by the Ancient Monuments Board as being monuments the preservation of which is of national importance ; and (*b*) such other monuments as the Commissioners think ought to be included in the list. The Commissioners when they propose to include a monument in the list, must inform the owner of the monument of their intention and of the penalties which may be incurred by persons guilty of the following offences, viz.—Where the owner of any ancient monument which is included in any such list proposes to demolish or remove in whole or in part, structurally alter, or make additions to, the monument, he shall forthwith give notice of his intention to the Commissioners and shall not, except in the case of urgent necessity, commence any work of demolition, removal, alteration, or addition for a period of one month after having given such notice ; and any person guilty of a contravention of, or non-compliance with, this provision shall be liable, on summary conviction, to a fine not exceeding one hundred pounds or to imprisonment for a term not exceeding three months, or to both. The foregoing provisions do not apply to any structure occupied as a dwelling-house by any person other than the caretaker thereof and his family (s. 12).

Section 7.—Access and Penalties.

789. The public shall have access to any monuments of which the Commissioners or a local authority are the guardians, at such times and under such regulations as may from time to time be prescribed by the Commissioners or authority. This provision is not to apply to any monument of which the Commissioners or authority have been constituted guardians before the commencement of the Act (except in cases where the consent of the owner has been given to the public having access to the monument, either by the deed constituting the Commissioners or authority as guardians or otherwise). Where the deed constituting

the Commissioners or authority guardians, in the case of a deed executed after the commencement of the Act, so provides, the public shall not have access to the monument without the consent of the owner of the monument (s. 13).

790. If any person injures or defaces any monument of which the Commissioners or authority are owners or guardians, or which is the subject of a Preservation Order, or to which this provision applies by virtue of an Order in Council made thereunder, he shall, on summary conviction, be liable either to a fine not exceeding £5, and, in addition thereto, to pay such sums as the Court by whom he is tried think just for the purpose of repairing any damages caused by him, or to imprisonment, with or without hard labour, for a term not exceeding one month. The owner of an ancient monument shall not be punishable under the foregoing provision in respect of any act which he may do to the monument except in cases where the Commissioners or authority have been constituted guardians of it, and in that case he may be dealt with as if he were not the owner. The foregoing provisions may be applied by Order in Council to any monument specified in the order (s. 14).

Section 8.—Advisory Board.

791. The Commissioners are to constitute an Advisory Board, called the Ancient Monuments Board, consisting of members representing the following bodies named in the First Schedule to the Act: The Royal Commissions on Historic Monuments in England, Scotland and Wales, The Societies of Antiquaries of London and Scotland, The Royal Academy of Arts, The Royal Institute of British Architects, The Trustees of the British Museum, The Board of Education, and such other members as the Commissioners may appoint. Separate Advisory Boards may also be constituted for Scotland and Wales. The First Schedule may be altered by Order in Council. The Ancient Monuments Board may, if so requested by the owner of an ancient monument, give advice, free of charge, except for out-of-pocket expenses, regarding the treatment of the monument (s. 15).

Section 9.—Inspection of Monuments.

792. The Commissioners, with consent of the Treasury, are to appoint one or more inspectors of ancient monuments, whose duty it is to report to the Commissioners on the condition of ancient monuments, and on the best mode of preserving them (s. 16). The Commissioners may give advice as to the treatment of any ancient monument, and shall, as and when required, give that advice regarding the treatment of any monument placed under their protection by a Preservation Order. They may also superintend any work in connection with any ancient monument, if invited to do so by the owner, and must superintend any such work, whether requested to do so by the owner or not, in con-

nection with any monument placed under their protection by a Preservation Order, if they think it advisable. Such advice and superintendence is to be given free of charge, except for out-of-pocket expenses, in the case of monuments not placed under their protection by a Preservation Order (s. 17).

Section 10.—Miscellaneous.

793. In Scotland, where it appears to the council of a county or Royal or Parliamentary burgh that the erection of buildings of a style of architecture in harmony with other buildings of artistic merit existing in the locality is impeded in consequence of any bye-laws with respect to new streets or buildings in force in the county or burgh, the council may, with consent of the Local Government Board for Scotland, relax the bye-laws so far as may be necessary to allow the erection of such buildings, having due regard to safety from fire and to sanitation (ss. 18 and 23 (2)). The Advertisement Regulation Act, 1907,[1] is to be construed as if the powers of the local authority therein defined (*i.e.* town or county council) included an additional power to make bye-laws prohibiting or restricting the display of advertisements or notices of such a nature as to be detrimental to the amenities of any ancient monument specified therein (s. 19).

794. The Commissioners of Works are to be a body corporate by that name with perpetual succession and a common seal, and may acquire by gift, will, or otherwise, and hold any land or estate or interest in land. Any conveyance, appointment, devise or bequest of land, or of any estate or interest in land to the Commissioners or a local authority, under the Act is not a conveyance, etc., to a charitable use (s. 20).

795. The expenses of a county council are to be defrayed out of the general purposes rate, and those of the council of a Royal or Parliamentary burgh, out of the general improvement assessment. A county council may borrow as for the purposes of the Local Government (Scotland) Act, 1889,[2] and a burgh council as for the purposes of the Public Health (Scotland) Act, 1897.[3] Money is to be borrowed by a burgh council on the security of the fund or rate out of which the expenses of the council are payable (s. 21). A duplicate of any report made to the Commissioners by an inspector or by the Ancient Monuments Board with reference to an ancient monument in Scotland, is to be forwarded to the Board of Trustees for the National Galleries, and any representations made by the latter regarding the monument are to be taken into consideration by the Commissioners (s. 23).

796. On 7th February 1908 a Royal Commission was appointed "to make an inventory of the Ancient and Historical Monuments, and constructions connected with, or illustrative of, the contemporary culture, civilization, and conditions of life of the people in Scotland from the earliest times to the year 1707."

[1] 7 Edw. VII. c. 27. [2] 52 & 53 Vict. c. 50. [3] 60 & 61 Vict. c. 38.

ANIMALS.

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Section 1.—Property in Animals.

Subsection (1).—*Classification.*

797. The law of Scotland follows the civil law in its division of animals into two classes, viz. (1) domestic animals (*mansuetæ naturæ*) such as cattle, sheep, horses, dogs, pigs, and poultry; and (2) wild animals, including wild beasts, game of all kinds, and all fishes, reptiles, and insects.

Subsection (2).—*Domestic Animals.*

798. Domestic animals are the property of their owners, and so remain, even although they should stray.[1]

[1] Ersk. ii. 1, 10; Stair, ii. 1, 5, 33; Bankt. ii. 1, 7.

SUBSECTION (3).—*Wild Animals.*

799. To wild animals (*feræ naturæ*) the maxim is applicable, *Quod nullius est fit occupantis*—they are the property of the first captor, and remain his property so long as he retains possession of them [1]; *e.g.* there is no property in deer unless they are tame, even though they are in a park,[2] nor in pheasants.[3] But if an animal *feræ naturæ*, which has been captured, regains its liberty, the ownership in it *ipso facto* comes to an end.[4] To the general rule of the common law, that first capture of a wild animal confers the property of it on the captor, "the only proper exception is that of royal fish, which belong to the Crown," [5] viz. whales found stranded on the seacoast, if larger than can be drawn by a wain with six oxen.[6] Although salmon-fishings belong to the Crown, and illegal fishing may be punished, the salmon itself is *feræ naturæ*, and falls under the general law of occupancy which is expressed in the maxim referred to.[7]

800. It is always a question of circumstances whether a wild animal has been reduced to possession or not. In one case our law recognises constructive appropriation, holding that where one wounds a wild animal so that it may be forthwith taken, and continues in pursuit of it, his claim will exclude that of another who intervenes to capture it.[8] Since a wild animal becomes the property of its captor from the moment that it falls within his power and control, the crime of theft is committed if it is then feloniously appropriated by another. As there is no property in a wild animal while it remains free, there can be no theft of it while in that condition. In charging theft of an animal *feræ naturæ*, it is necessary to specify distinctly the mode in which it was reduced into, and remained in, the possession of the person from whom it is alleged to have been stolen.[9] As to the conventional rule of "fast and loose" recognised in whale-fishing in the North Sea, see the cases cited below.[10]

801. The offence of poaching is purely statutory, and consists in any violation of a proprietor's right of hunting and killing game—a right which is vested in him in virtue of his real title to the lands, and which remains with him as a separate estate after the lands have been let for other purposes.[11] Unless the statutes dealing with poaching expressly provide for forfeiture of the animals captured,[12] the general law of occupancy is applicable, and they remain the property of the taker.[13] See GAME LAWS.

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[1] Thomson's Acts, i. 749. [2] *Malloch* v. *Eastley*, 1685, 3 Salk. 291.
[3] *Wilson* v. *Dykes*, 1872, 10 M. 444; 2 Coup. 183. [4] Thomson's Acts, *l.c.*
[5] Bell, Prin., s. 1288. [6] Thomson's Acts, i. 748; *Bruce* v. *Smith*, 1890, 17 R. 1000.
[7] Ersk. ii. 1, 10. [8] Stair, ii. 1, 33.
[9] *Huie*, 1842, 1 Broun, 383; *Wilson* v. *Dykes*, *ut supra*; see also Hume, i. 81; Alison, i. 279; Macdonald, 19; Anderson, Criminal Law, 99.
[10] *Addison & Sons* v. *Row*, 1794, 3 Pat. App. 334; *The Aberdeen Arctic Co.* v. *Sutter*, 1862, 4 Macq. 355.
[11] Irvine, Game Laws, 32. [12] *e.g.* 2 & 3 Will. IV. c. 68, s. 5.
[13] Stair, *l.c.*; Ersk. *l.c.*; *Scott* v. *Everitt*, 1853, 15 D. 288.

Section 2.—Horses.

Subsection (1).—*Sale.*

(i) *General Rules.*

802. Contracts relative to the sale, hiring, custody, and carriage of horses are subject to precisely the same rules of law as are applicable to other classes of moveable property, and reference generally should be made to the subjects of Contract and Sale. The provisions of the Sale of Goods Act, 1893, with respect to the sale of horses in open market (s. 22), are not applicable to Scotland, because with us there is no law of market overt, such as exists in England and Ireland. Accordingly, the *vitium reale* attaching to a horse stolen in Scotland is indelible till its return to the original owner, and it is recoverable from a *bona fide* purchaser.[1] Horses were held to be "goods" under s. 5 of the Mercantile Law Amendment Act, 1856,[2] and have so been considered under s. 14 of the Sale of Goods Act, 1893.[3] Should a horse die or become injured while in the hands of an intending purchaser, the burden lies on him of proving that he was not to blame for the death or injury ; and he is liable in the same degree of diligence as the hirer of a horse.[4] In the case of the sale of a specific horse without a warranty, the rule *caveat emptor* applies if the purchaser has had opportunity of examining the animal, and he takes it with all its faults, unless there be fraud on the part of the seller. A seller is not bound to disclose discoverable defects unless this duty is laid on him by the purchasers.[5]

803. Wilful misrepresentation of material facts as to a horse's condition of health or habit is a good ground for annulling a contract of sale,[6] or for claiming damages ;[7] but not unless the misrepresentation is material.[8] Concealment amounts to fraud, provided there be a duty to disclose material facts. Devices to conceal defects, such as filling up a sand-crack or thrush, and such practices as gingering, are fraudulent ;[9] and when a horse is sold "with all faults," the seller is not protected against faults he has been at pains to disguise.

(ii) *Warranty and Representation.*

804. A horse warranty is an essential condition forming part of the contract of sale ; hence, on breach of warranty the sale is reducible. All affirmations of quality made to the buyer as grounds of reliance are warranties. It is not necessary that they be in writing,[10] nor that they be made simultaneously with the sale. To establish an

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[1] *Todd* v. *Armour*, 1882, 9 R. 901.
[2] 19 & 20 Vict. c. 60 ; *Young* v. *Giffen*, 1858, 21 D. 87.
[3] 56 & 57 Vict. c. 71 ; *Wilson* v. *Turnbull*, 1896, 23 R. 714.
[4] *Pullars* v. *Walker*, 1858, 20 D. 1238.
[5] *Yeats* v. *Reid*, 1884, 21 S.L.R. 698.
[6] *Brown* v. *Gilbert*, 1791, Hume, 671 ; *Beddie* v. *Milroy*, 1812, *ibid.* 695.
[7] Sale of Goods Act, s. 53.
[8] *Beddie, ut supra.*
[9] *Cossar* v. *Marjoribanks*, 1826, 4 S. 685.
[10] *Scott* v. *Steel*, 1857, 20 D. 253.

express oral warranty it is necessary to prove the very words used,[1] but it may be construed with reference to all surrounding circumstances.[2] Honest belief by a seller giving a warranty that a horse possesses certain qualities does not free him if the horse *de facto* does not possess them.[3] All warranties apply to the state of the horse at the time of sale.[4] Should disease shew itself soon after sale, it is a question of evidence whether or not it amounts to a breach of warranty, and it lies on the purchaser to shew that the disease existed at the date of sale ;[5] but a warranty may be taken to secure a purchaser against risks arising out of the natural liability of an animal to be attacked by disease.[6]

805. Representations by horse-dealers, or affirmations in praise of a horse, may be mere *verba volantia*, and not warranties, unless on the faith of them a sale takes place. The border-line between recommendation and warranty is a very hazy one.[7] It is a jury question whether a representation comes up to a warranty. A general warranty such as is inferred from the word "warranted" means that a horse is fit for immediate work.[8] Such a warranty does not cover patent defects. An express warranty, whether of fitness or for specific purpose, is confined to what is expressed in it. "Believed sound" is limited to the seller's belief. "Warranted sound," or "this horse is sound," renders the seller liable if the horse be unsound. If any peculiarity, such, *e.g.*, as age, is to be guarded, it must be inserted in the warranty.[9] "Free from fault" covers unsoundness, vice, and blemish.[10] "Quiet in harness and saddle and sound *to the best of my knowledge*" means that the words in italics apply both to quietness and soundness.[11]

806. When a horse is sold expressly for a particular purpose it must be fit for that purpose, whether the seller is aware of its defect or not.[12] A horse "fit to be ridden by a gentleman advanced in life" must not be vicious and sulky ;[13] and if a pair is bought to work together, though each goes well by itself, they must be capable of working together, or they may be rejected.[14] If the warranty of fitness for a particular purpose be implied, the purpose must be different from the ordinary

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[1] *Robeson* v. *Waugh*, 1874, 2 R. 63 ; *Mackie* v. *Riddell*, 1874, 2 R. 115.
[2] *Weston* v. *Potter*, 1846, 8 L.T. (O.S.) 137.
[3] *Brown* v. *Hunter*, 1926, S.L.T. (Sh. Ct.) 21.
[4] *Ewart* v. *Hamilton*, 1791, Hume, 667 ; *Gilmer* v. *Galloway*, 1830, 8 S. 420 ; *M'Bey* v. *Reid*, 1842, 4 D. 349 ; *Hendrie* v. *Stewart*, 1842, 4 D. 1417 ; *Pollock* v. *Macadam*, 1840, 2 D. 1026 ; *Brown* v. *Boreland*, 1848, 10 D. 1460 ; *Gardiner* v. *M'Leavy*, 1880, 7 R. 612.
[5] *Wright* v. *Blackwood*, 1833, 11 S. 722 ; *Dykes* v. *Hill*, 1860, 22 D. 1523 ; *Begbie* v. *Robertson*, 1828, 6 S. 1014.
[6] *Kyle* v. *Sim*, 1925, S.C. 425.
[7] *Rough* v. *Moir & Son*, 1875, 2 R. 529 ; *Wilson* v. *Turnbull & Co.*, 1896, 23 R. 714.
[8] *Ralston* v. *Robb*, 1808, Mor. *voce* "Sale," App. 6.
[9] *Scott* v. *Steel*, *ut supra* ; *Thomson* v. *Miller*, 1859, 21 D. 726.
[10] *Deuchars* v. *Shaw*, 1833, 11 S. 612.
[11] *Campbell* v. *Henderson*, 1886, 23 S.L.R. 712.
[12] *Rough*, *ut supra*.
[13] *Campbell*, *ut supra*.
[14] *Dundas* v. *Fairbairn*, 1797, Hume, 677 ; *Wemyss* v. *Seton*, 1802, *ibid.* 682.

purpose.[1] Trial before rejection must be fair and reasonable, and such as to test the animal ;[2] but it must not be put to excessive work, nor subjected to more severe work than a prudent man would put his own horses to.[3] If a purchaser use a horse on trial as his own, he is barred from rejecting it. Notice of refusal to accept being equivalent to return under the old law,[4] the obligation of a buyer immediately to place a horse he intends to reject in neutral custody no longer prevails.[5]

(iii) *Warranty of Soundness.*

807. Soundness means fitness for immediate use. A sound horse is one free from any disease or structural defect which does, or may, diminish its natural usefulness.[6] If a horse suffers to this extent from a curable disease, it is unsound till fit for work. Broken wind, being incurable, constitutes unsoundness. Cough, cold, and sore throat may or may not amount to unsoundness.[7] Roaring is not unsoundness unless symptomatic of disease.[8] Similarly spavin, thrush, navicular joint disease,[9] sand-crack, and the like, are indications of unsoundness ;[10] but mere thinness of sole does not render a horse unsound ; nor do corns or splint, unless of such a character as to impair usefulness.[11] The same principles are applicable in the case of a horse suffering from blindness,[12] or other ailments. Crib-biting and wind-sucking, if sufficiently injurious to health, may amount to unsoundness.[13]

(iv) *Vice.*

808. The legal meaning of vice in a horse is, a bad habit, either manifested in temper, so as to render it dangerous or diminish its natural usefulness, or injurious to health.[14] Backing, jibbing, biting,

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[1] *Hamilton* v. *Robertson*, 1878, 5 R. 839—a case under the Mercantile Amendment Law Act ; see also *Rough* v. *Moir & Son*, *ut supra*.

[2] *M'Bey* v. *Reid*, 1842, 4 D. 349.

[3] *Pullars* v. *Walker*, 1858, 20 D. 1238.

[4] Sale of Goods Act, 1893, s. 36.

[5] *M'Bey*, *ut supra*.

[6] *Kiddel* v. *Burnard*, 1842, 9 M. & W. 668 ; *Dundas* v. *Fairbairn*, 1797, Hume, 677 ; *Ralston* v. *Robb*, 1808, Mor. *voce* "Sale," App. 6.

[7] *Dykes* v. *Hill*, 1860, 22 D. 1523 ; *Newlands* v. *Leggatt*, 1885, 12 R. 820 ; *Gardiner* v. *M'Leavy*, 1880, 7 R. 612 ; *Shillitoe* v. *Claridge*, 1816, 2 Chit. 425 ; *Bolden* v. *Brogden*, 1838, 2 Moo. & R. 113.

[8] *Basset* v. *Collis*, 1810, 2 Camp. 522 ; *Onslow* v. *Eames*, 1817, 2 Stark. 81.

[9] *Robeson* v. *Waugh*, 1874, 2 R. 63.

[10] *Pollock* v. *Macadam*, 1840, 2 D. 1026 ; *Hendrie* v. *Stewart*, 1842, 4 D. 1417 ; *Brand* v. *Wight*, 1813, Hume, 697 (string-halt).

[11] *Ewart* v. *Hamilton*, 1791, Hume, 667 ; *Ralston*, *ut supra* ; see also *Fisher* v. *Ure*, 1846, 9 D. 17 ; *Jardine* v. *Ewart*, 1806, 14 F.C. 253 ; *Bailey* v. *Forrest*, 1845, 2 Car. & Kir. 131.

[12] *Martin* v. *Ewart*, 1791, Hume, 703 ; *Scott* v. *Hannah and Hibbert*, 1815, Hume, 702 ; *Russell* v. *Ferrier and Ainslie*, 1792, Hume, 675.

[13] *Deuchars* v. *Shaw*, 1833, 11 S. 612 ; *Vaucamps* v. *Campbell's Trs*, 1889, 5 S.L. Rev. 353 ; *Broennenburgh* v. *Haycock*, 1817, Holt N.P. 630 ; *Scholefield* v. *Robb*, 1839, 2 Moo. & R. 210.

[14] *Geddes* v. *Pennington*, 1814, 17 F.C. 606 ; 6 Pat. App. 312 ; *Fisher* v. *Ure*, 1846, 9 D. 17 (insufficient gelding) ; see Lord Wood in *Scott* v. *Steel*, 1857, 20 D. 253, 257.

kicking, rearing, bolting, if persistent, are vicious habits. Shying,[1] if inveterate, or habitual restlessness in harnessing [2] or mounting,[3] so as to render these operations dangerous, constitute vice.

Subsection (2).—*Sale by Auction.*

809. The position of auctioneer is that of custodier and factor for the seller till purchase, and then custodier for the buyer ; but if a horse is put up and not sold, and the auctioneer request the owner to take it away, the custody reverts to the owner. An auctioneer giving a warranty without authority does so at his own risk. Conditions of sale are sufficiently notified by being printed with the catalogue or posted up in the auction-mart. They are to be fairly construed, and are not altered by verbal declarations by the auctioneer.[4]

Subsection (3).—*Hiring.*

810. When a horse specially hired accidentally dies while on hire, the lessor is discharged; and if it becomes temporarily useless through no fault of his own, the lessee can either abandon the contract or claim abatement of the hire. But if the hire be of an indefinite animal, as in the case of "jobbing out" horses, accidental death does not free the lessor. If a hired horse take ill, the risk is with the lessor, unless the illness be temporary or there be fault on the lessee's part.[5] A hired horse must only be put to such use as is implied in the contract [6]; and a lessee is liable for a horse injured by being galloped in a field when it was hired to be ridden along a road.[7] If a horse fall lame, the lessee should put it up at the most convenient place, and notify the owner.[8] He should provide veterinary treatment, and not treat it himself.[9] When a horse is accidentally killed while on hire, or at wintering or grazing, the loss falls on the owner, unless there be fault on the custodier's part. It appears that the onus is on the custodier to prove absence of fault on his part, at any rate when the horse was sound when taken over.[10]

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[1] *Begbie* v. *Robertson*, 1828, 6 S. 1014 ; *Rose* v. *Johnston*, 1878, 5 R. 600.

[2] *Scott, ut supra.*

[3] *Fraser* v. *Jones*, 1886, 2 S.L. Rev. 292.

[4] *Lang* v. *Bruce*, 1832, 10 S. 777 ; *Hain* v. *Laing & Sons*, 1853, 15 D. 667 ; *Yeats* v. *Reid*, 1884, 21 S.L.R. 698.

[5] *Marquis* v. *Ritchie*, 1823, 2 S. 386 ; *Wilson* v. *Orr*, 1879, 7 R. 266 ; *Hagart* v. *Inglis*, 1832, 10 S. 506 ; *Smith* v. *Melvin*, 1845, 8 D. 264 ; *Fowler* v. *Lock*, 1872, L.R. 7 C.P. 272.

[6] *Straton*, 1610, Mor. 3148 ; *Moffat* v. *Moffat*, 1624, Mor. 10073 ; *Shaw* v. *Donaldson*, 1792, Hume, 297 ; *Gardeners* v. *M'Donald and M'Callum*, 1792, Hume, 299.

[7] *Seton* v. *Paterson*, 1880, 8 R. 236 ; see *Bain* v. *Strang*, 1888, 16 R. 186, for a case of loan.

[8] *Bray* v. *Mayne*, 1818, 1 Gow, 1.

[9] *Dean* v. *Keate*, 1811, 3 Camp. 4 ; *Campbell* v. *L. Kennedy and Dowbigging*, 1828, 6 S. 806.

[10] *Binny* v. *Veaur*, 1679, Mor. 10079 ; *Robertson* v. *Ogle*, 1809, 15 F.C. 348 ; *Pyper* v. *Thomson*, 1843, 5 D. 498 ; *Pullars* v. *Walker*, 1858, 20 D. 1238 ; *Wilson* v. *Orr*, 1879, 7 R. 266 ; *Mustard* v. *Paterson*, 1923 S.C. 142. The views expressed to the contrary in *Sutherland* v. *Hutton*, 1896, 23 R. 718, must, it is thought, now be regarded as unsound.

Subsection (4).—*Custody and Carriage.*

811. Livery-stable keepers must provide secure stables,[1] and proper labour in dressing and feeding. Graziers' parks must be free from pitfalls [2] and diseased animals.[3] Breakers and trainers must preserve horses entrusted to them from dangers.[4]

812. Railway companies who carry live stock must receive a horse if offered to them at a reasonable time; but their duty in this respect is limited to the convenience at their disposal,[5] and only when they can reasonably be expected to have wagons at the station.[6] They must provide a reasonably sufficient vehicle for its transit,[7] and tie it up in the van,[8] and provide safe means of unloading,[9] unless these duties have been undertaken by the consigner.[10] Railway companies are not insurers, and in the absence of negligence they are not liable in damages.[11] If the horse is injured in transit, the presumption is against the carriers, but they are not liable if they prove that the accident was due to the inherent vice of the horse,[12] and not to their negligence.[13]

Subsection (5).—*Exportation and Shipment of Horses.*

813. The Diseases of Animals Act, 1910 [14] (as amended by the Exportation of Horses Act, 1914) [15] regulates the exportation and shipment of horses (which term in the Act includes asses and mules (s. 8)) with the object of preventing suffering to the animals, by prohibiting the export of such as are unfit. Except in the cases after mentioned, and in such other cases as may be prescribed by order of the Board of Agriculture and Fisheries, it is not lawful to ship, or attempt to ship a horse, in any vessel from any port in Great Britain to any port outside the British Isles, unless immediately before shipment the horse has been examined by a veterinary inspector appointed by the Board to conduct examinations under the Act, and has been certified in writing by him to be capable of being conveyed to such port and disembarked

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[1] *Searle* v. *Laverick*, 1874, 43 L.J.Q.B. 43.

[2] *Davidson*, 1749, Mor. 10081; *M'Lean* v. *Warnock*, 1883, 10 R. 1052; *Mack* v. *Allan and Simpson* 1832, 10 S. 349; but see *Sutherland* v. *Hutton, ut supra.*

[3] *Robertson* v. *Connolly*, 1851, 13 D. 779; 14 D. 315.

[4] *Laing* v. *Darling*, 1850, 12 D. 1279.

[5] *M'Manus* v. *L. & Y. Rly. Co.*, 1859, 4 H. & N. 327.

[6] *M'Namara* v. *Great Southern and Western Rly. Co.*, 1867, 1 Ir. L.T. 120.

[7] *Blower* v. *Great Western Rly. Co.*, 1872, L.R. 7 C.P. 655; *M'Manus, ut supra.*

[8] *Paxton* v. *North British Rly. Co.*, 1870, 9 M. 50; *Rain* v. *Glasgow and South-Western Rly. Co.*, 1869, 7 M. 439.

[9] *Willoughby* v. *Horridge*, 1852, 12 C.B. 742.

[10] *Richardson and Sisson* v. *N. E. Rly. Co.*, 1872, L.R. 7 C.P. 75.

[11] *M'Indoe* v *Midland Great Western Rly. Co.*, 1882, 16 L.T. 99.

[12] *Paxton, Ralston,* and *Blower, ut supra*; *Kendall* v. *London and South-Western Rly. Co.*, 1872, L.R. 7 Ex. 373, 377.

[13] *Gill* v. *Manchester, Sheffield, and Lincolnshire Rly. Co.*, 1873, L.R. 8 Q.B. 186. See also *Lord Polwarth* v. *North British Rly. Co.*, 1908, S.C. 1275; 15 S.L.T. 461.

[14] 10 Edw. VII. & 1 Geo. V. c. 20.

[15] 4 & 5 Geo. V. c. 15.

without cruelty and " to be capable of being worked without suffering." The certificate must be delivered at the time of shipment to the master of the vessel on which the animal is shipped, who shall, on demand, produce the same to any constable, or any inspector or other officer of the Board, or the local authority, and allow such person to take a copy of, or extract from, the certificate (*ibid.*). A fee may be charged for any licence, permit, or examination required by any order relating to exportation or shipment (s. 2). Inspectors may enter any vessel for the purposes of the Act and of the Act of 1894.[1] Orders under the section prescribing the cases to be excepted must be laid before both Houses of Parliament (*ibid.*).

814. If any horse examined under the Act is found by the veterinary inspector to be in such a physical condition that it is cruel to keep it alive, or that it is permanently incapable of being worked without suffering, he may, without the consent of the owner, slaughter the animal or cause it to be slaughtered in such a manner as to inflict as little suffering as practicable.[2]

815. For the purposes of identification, a veterinary surgeon may mark a horse certified by him under s. 1 in such manner as the Board may by order prescribe (s. 1 (3)). If any person, with a view to evading the provisions of the Act, marks a horse with the prescribed mark, or with a mark so nearly resembling it as to be calculated to deceive, he is guilty of an offence against the Diseases of Animals Act, 1894 (s. 1 (4)).

816. If any horse shipped from any port in Great Britain to any port outside the British Islands has a limb broken or is otherwise seriously injured while on board, so as to be incapable of being disembarked without cruelty, the master of the vessel shall forthwith cause the animal to be slaughtered, and every vessel on which a horse is so shipped shall carry a proper killing instrument, to be approved of by the Board of Agriculture and Fisheries for that purpose, and it shall be the duty of the owner and master of every such vessel to see that the vessel is provided with such an instrument, and the master, if so required by an inspector of the Board or of the local authority, shall produce the instrument for his inspection (s. 3).

817. If any person does anything, or omits to do anything, in contravention of any of the provisions of the Act, or if the master of a vessel permits a horse to be shipped therein in contravention of the Act, he is to be deemed guilty of an offence against the Diseases of Animals Act, 1894, and the provisions of that Act relating to offences and legal proceedings apply accordingly as if the expression "animal" therein included horses (asses and mules) (ss. 6, 8).

818. The Act does not apply in the case of shipment of any thoroughbred horse certified in writing by a steward or the secretary of the Jockey Club (*a*) to have arrived in Great Britain not more than one month

[1] 1910 Act, s. 4.

[2] 1914 Act, s. 1 (2).

before the date of shipment for the purpose of being run in a race; or (*b*) to be shipped for the purpose of being run in a race; or (*c*) to be shipped in order to be used for breeding purposes (s. 7). Such certificate must be delivered at the time of shipment to the master of the vessel, who shall, on demand, produce the same to any constable, or any inspector or other officer of the Board, or the local authority, and allow such person to take a copy or extract (*ibid.*).

819. Every local authority described in the Diseases of Animals Act, 1894, must, if and so far as the Board by order so direct, execute and enforce the Act within their district (s. 5).

Section 3.—Dogs.

820. The law relating to dogs has been consolidated by the Dogs Act, 1906.[1]

Subsection (1).—*Injury to Cattle.*

821. The owner of a dog is liable in damages for injury done by the dog to any cattle (which includes horses, mules, asses, sheep, goats, and swine (s. 7)). It is not necessary to shew (1) a previous mischievous propensity in the dog; or (2) the owner's knowledge of such previous propensity; or (3) that the injury was attributable to neglect on the part of the owner. The occupier of any house or premises where the dog is kept or permitted to live or remain at the time of the injury is presumed to be the owner of the dog, and he is liable for the injury, unless he proves that he was not the owner of the dog at that time. Where a dog is proved to have injured cattle or chased sheep, it may be dealt with under s. 2 of the Dogs Act, 1871,[2] as a dangerous dog (s. 1).

Subsection (2).—*Stray Dogs.*

822. Where a police officer has reason to believe that any dog found in a highway or place of public resort is a stray dog, he may seize the dog, and may detain it until the owner has claimed it and paid all expenses incurred by reason of its detention (s. 3 (1)). If the dog has a collar with an address on it, or if the owner is known, a notice in writing must be served on the person whose address is on the collar, or on the known owner, intimating that the dog has been so seized, and will be liable to be sold or destroyed if not claimed within seven clear days after service of the notice (s. 3 (2)). If not claimed, and all expenses paid, within seven clear days after seizure or the notice (as the case may be), the dog may be sold, or may be destroyed in a manner so as to cause as little pain as possible (s. 3 (4)). A register of dogs so disposed of must be kept, and may be inspected by the public. No dog so seized shall be given or sold for the purposes of vivisection (s. 3 (5)). The dog must be properly fed and maintained (s. 3 (8)). It is an offence know-

[1] 6 Edw. VII. c. 32. [2] 34 & 35 Vict. c. 56.

ingly to permit without reasonable excuse the carcass of any head of cattle to remain unburied in a field or other place to which dogs can gain access to (s. 6). Proceedings under the section may be competently bought by the Procurator-Fiscal by way of a complaint.[1]

Subsection (3).—*Dog Licences.*

823. Subject to certain exemptions, every person who keeps a dog must annually take out a licence, the price of which is seven and sixpence. It is the person, not, as is sometimes supposed, the dog, which is licensed; and accordingly a new licence is not required on a change of dogs, whilst, on the other hand, a person who, not having a licence, acquires a dog, must take out a licence, although the person from whom the dog was acquired had a licence for the current year.

The provisions with reference to dog licences are contained in the Dog Licences Act, 1867,[2] as amended by the Customs and Inland Revenue Act, 1878.[3] All licences expire upon December 31 in each year,[4] no matter at what period of the year they may have been taken out.

824. The exemptions under the Act are as follows:—

(1) *Blind Persons' Dogs.*—The Customs Act, 1878, provides (s. 21) that nothing in the Dog Licences Act, 1867, or in this Act, shall render a licence necessary in the case of a dog kept and used solely by a blind person for his guidance.

(2) *Shepherds' Dogs.*—The Act 32 & 33 Vict. c. 14, s. 39, in regard to shepherds' dogs, is repealed by the Customs Act, 1878, s. 18, and it is provided that farmers and shepherds keeping sheep dogs must obtain an exemption from the officers of the revenue. The grant of a certificate under s. 22 of the latter Act requires the previous consent of the Sheriff or Sheriff-Substitute having jurisdiction in the place where the dog is kept; but such consent must not be withheld if the Court is of opinion that the conditions mentioned in said section apply.[5] No fee is payable in respect of such consent or application therefor. To entitle an owner to exemption, the dog must be either (1) kept only on a farm, and not merely kept but used only for tending sheep or cattle; or (2) kept and used only by a shepherd and only in pursuit of his calling.[6] Two dogs may be so kept, or more, up to eight, in proportion to the number of sheep on common or unenclosed land. The possession of an exemption certificate is at least *prima facie* evidence that the dog is within the category entitled to exemption.[7]

(3) *Young Dogs.*—No licence is required for any dog under the age of six months;[8] and where an owner or a master of hounds has taken

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[1] *Walker* v. *Brander*, 1920 J.C. 20.
[2] 30 & 31 Vict. c. 5.
[3] 41 & 42 Vict. c. 15.
[4] 1867 Act, s. 5.
[5] Dogs Act, 1906, 6 Edw. VII. c. 32, s. 5 (1).
[6] *Ross* v. *Alexander*, 1924, S.L.T. (Sh. Ct.) 69.
[7] *James* v. *Nicholas*, 1886, 50 J.P. 292.
[8] Dog Licences Act, 1867, s. 10.

out proper licences for all the hounds entered in any pack kept by him, it is not necessary for him to take out a licence in respect of any hound under the age of twelve months which has never been entered in or used with any pack of hounds.[1] The onus of proof of the age of a dog lies on the owner.[2]

825. Dog licences are subject to the Excise Acts.[3] The person in whose custody the dog is found is presumed to be the owner, unless the contrary be proved, and the penalty for contravention is £5 for each offence (s. 8). A like penalty is imposed for failure, on the part of the person who has taken out a licence, to produce it on demand (s. 9). The penalties may be recovered either under the Excise Acts (s. 4) or upon information of a police constable before a Court of summary jurisdiction. Such Court has power to mitigate penalties and to award expenses.[4] Where an Excise officer prosecutes under the Excise Acts, the Court may mitigate to any sum on a first offence, but to not less than one-fourth for any subsequent offence, whether it is charged as a second offence in the information or not.[5]

Section 4.—Sheep.

826. In addition to the rules of common law affecting owners of moveable property generally, owners of sheep are placed under certain liabilities, and are entitled to certain protection by statute. By s. 123 of the Roads and Bridges Act of 1878,[6] incorporating s. 103 of 1 & 2 Will. IV. c. 43, the person having charge, or, if he cannot be found, the owner, of sheep found straying or pasturing on any turnpike road is liable in a penalty of five shillings for each sheep. By the Winter Herding Act[7] certain civil liabilities are imposed on account of sheep straying on to private lands. On the other hand, by the Act known as the Sheepworrying Act of 1863,[8] the pursuer of an action for damages for injury done to his sheep by a dog does not require to prove a previous propensity in such dog to injure sheep. This provision was re-enacted in the Dogs Act, 1906,[9] which also contains provisions which afford sheepowners, among others, a protection against dangerous dogs.

827. The Diseases of Animals Act, 1903,[10] amended the Diseases of Animals Act, 1894,[11] by authorising Local Authorities to make regulations for prescribing, regulating, and securing the periodical treatment of all sheep by effective dipping or by the use of some other remedy for sheep scab. Power is given to the Local Authority to maintain portable dipping tanks. Regulations as to dipping are issued from time to time. In a prosecution under the Sheep Scab Order, 1905, art. 1 (1), for failure

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[1] Customs Act, 1878, s. 20. [2] *Ibid.* s. 19.
[3] 1867 Act, s. 4. [4] Customs Act, 1878, s. 23.
[5] *Murray* v. *Thompson*, 1888, L.R., 22 Q.B.D. 142. [6] 41 & 42 Vict. c. 51.
[7] 1686, c. 11; *Govan* v. *Lang*, 1794, Mor. 10499; *Loch* v. *Tweedie*, 1799, Mor. 10501; cf. *Fraser* v. *Smith*, 1899, 1 F. 487; *M'Arthur* v. *Jones*, 1878, 6 R. 41.
[8] 26 & 27 Vict. c. 100. [9] 6 Edw. VII. c. 32.
[10] 3 Edw. VII. c. 43. [11] 57 & 58 Vict. c. 57.

to give notice of suspected sheep scab, it was held that if it is proved that it was within the knowledge of the accused that a reasonable suspicion of sheep scab existed, it is unnecessary in order to a conviction to prove that the accused shared that suspicion.[1] The certificate of an inspector under the Act that sheep are suffering from sheep scab is conclusive evidence of what is therein stated.[2]

Section 5.—Pigeons.

828. In the eye of the law pigeons may be divided into three kinds: (1) wild pigeons, (2) dovecot pigeons, and (3) enclosed pigeons. The last are domestic animals in the same way as poultry, and are the subject of private property, and the taking of them is theft at common law. The first kind—wild pigeons—are in the ordinary category of animals *ferœ naturœ* and are *res nullius*. The only question of legal interest that has been raised in regard to them is whether they are vermin within the meaning of the Gun Licence Act, 1870.[3] That Act exempts from the gun licence the occupier of any lands using a gun "for the purpose only of scaring birds or of killing vermin on such lands." On this question reference may be made to the undernoted text-books,[4] and to the opinions in a case in regard to rabbits.[5] It seems doubtful whether, upon a sound construction of the statute, any species of birds can be held to be vermin, so as to entitle the non-licence-holder to kill and not merely to scare them. There is no claim to damages for injury done to crops by pigeons from a neighbour's woods.

829. The greater part of the law in regard to pigeons, however, is concerned with the second kind mentioned above, viz. dovecot pigeons, *i.e.* pigeons which have their headquarters in a dovecot, but are free to go and come. Such pigeons, according to old Scottish law, following the Roman law,[6] are, like bees, wild animals, and not private property.[7] At a very early period, however, protection was given to them by statute. Thus by the Act 1474, c. 60, the taking of pigeons from dovecots was declared to be punishable as theft; whilst by the Act 1567, c. 16, ratified by 1597, c. 270, the shooting of pigeons was prohibited under stringent penalties. These latter statutes, however, which prohibited also the shooting of many other animals, were probably directed mainly against what was deemed an unsportsmanlike manner of taking game; and, accordingly, Bankton affirms [8] that he knows of no law against the shooting of doves found at large: but this has been

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[1] *Maclean* v. *Laidlaw*, 1909 S.C. (J.) 68; 6 Adam, 93.
[2] *Jamieson* v. *Dow*, 1899, 2 F. (J.) 24; 3 Adam, 110.
[3] 33 & 34 Vict. c. 57, s. 7 (4).
[4] Irvine, Game Laws, 246; Journal of Jurisprudence, xxvi. (1882) 47; Rankine, Land-Ownership, 902.
[5] *Lord Advocate* v. *Young*, 1898, 25 R. 778.
[6] Dig. 41, 1, 5.
[7] Irvine, 23; but see per Lord Balgray in *Easton* v. *Longlands*, 1832, 10 S. 542; 5 Deas & And. 258.
[8] ii. 3, 167.

disapproved.[1] Kames, however, appears to agree with Bankton, so far at all events as the protection of crops is concerned. "Good neighbourhood requires that I should endeavour to chase away my neighbour's pigeons, without doing them any harm. But if, by the number of pigeon-houses round me, or by the voracity of the pigeons, this cannot be effectually done, the law of nature entitles me to proceed to blood. It is in vain to talk of damages, which in this case cannot be ascertained with any certainty. There is no statute against rabbit-warrens, though very ready to infest neighbouring grounds. It appears to me clear that I may lawfully kill my neighbour's rabbits if I find them burrowing in my ground. The case of pigeons is in this respect perfectly similar." [2] But this reasoning was not accepted in the case of *Easton* (*supra*).

830. Another Act [3] requires that for one dovecot the owner must have ten chalders of land within two miles. Under this Act a heritor is entitled to build one dovecot for every ten chalders of yearly rent of which he is possessed, provided that the limit of two miles is preserved.[4] This Act is still in observance ; and an eminent judge once startled an intrant to the Faculty of Advocates by propounding, as the first question in the Scots Law branch of the examination, the inquiry, "Wha may hae doos ?" A person without the necessary qualification must build up his pigeon-holes, but he need not pull down his dovecot, which may be used for other purposes, or may become available as a dovecot through his acquisition of lands.[5] The purchaser of lands and a dovecot, not being ruinous at the time of purchase, from a qualified person, may keep it though not himself qualified by the possession of ten chalders of land, but he may not increase the number of holes in it.[6]

831. Acts were from time to time passed from 1424, c. 33, downwards, enacting severe penalties against the destroyers of dovecots. A list of these Acts will be found in Irvine, p. 26; but probably nowadays such a case, if the pigeons were not taken, would be treated as one of malicious mischief ; and if a child were implicated in such a point of dittay he would probably be in greater danger of six strokes with the birch rod, under modern statute, than of being "leschet, scurgit, and dung, according to his falt," under the Act 1503, c. 69.

832. By the Captive Birds Shooting (Prohibition) Act, 1921,[7] every person who shall promote, arrange, and conduct, assist in, or receive money for, or take part in any meeting or competition, exhibition, pastime, practice, display, or in any event whatever at or in course of which captive birds are liberated by hand or by trap, contrivance, or other means for the purpose of being shot at the time

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[1] *Murray*, 1797, Mor. 7628 ; and per Lord Balgray in *Easton* v. *Longlands*, 1832, 10 S. 542 ; 5 Deas & And. 258.

[2] Kames, Select Decisions, 14 ; Mor. App. "Dovecot," No. 1.

[3] 1617, c. 19.

[4] Ersk. ii. 6, 7 ; Ross, Lect. ii. 173 ; *Brodie* v. *Gordon*, 1752, Mor. 3602.

[5] *Durie* v. *Heritors of Burntisland*, 1682, Mor. 3601.

[6] *Kinloch* v. *Wilson*, 1731, Mor. 3601.

[7] 11 & 12 Geo. V. c. 13.

of their liberation, or who, being the owner or occupier or person in charge of any premises, shall permit his premises or property, or any part thereof, to be used for any such purpose, shall be liable on summary conviction to a fine not exceeding £25, or alternatively, or in addition thereto, to be imprisoned, with or without hard labour, for a term not exceeding three months.

Pigeon-shooting premises may be found to be a nuisance to a neighbour.[1]

Section 6.—Swans.

833. Domestic swans and swans partially domesticated and furnished with collars or otherwise marked are private property.[2] Wild swans were at one time classed as *inter regalia*;[3] but this doctrine, which Erskine repudiates,[4] is not now law.[5] Swans are not included under the Game Acts; but, like other wild birds, they are protected by the Wild Birds Protection Act, 1880, and therefore they may not be killed between March 1 and August 1. The taking of their eggs may be prohibited in any county by the Secretary for Scotland, on the application of the county council, under the Wild Birds Protection Act, 1894.[6]

Section 7.—Bees.

834. Bees are private property only when in hive or skep or when working in the hollow of a tree or wall. Where bees are in a wild state they are the property of anyone who can obtain possession. When, however, the bees swarm from a hive, they remain the property of their owner so long as he pursues them upon property into which he is entitled to proceed. It has been held that the owner of lands was entitled to prevent the owner of the swarm who was pursuing the swarm upon his lands from so pursuing, and if the owner of the lands succeeded in hiving the swarm the bees thereby became his property.[7] The view has, however, been expressed that when bees hive, if identity can clearly be made out and a claim made without delay, the owner ought to have the property in preference to another on whose premises they have alighted.[8]

Section 8.—Protection of Wild Birds.

835. All Acts dealing with the preservation of wild birds prior to 1880 were repealed by s. 7 of the Act passed in that year. This Act,[9] with an amending Act passed in 1881,[10] forms the principal Act for the preservation of the birds themselves, while in 1894 a further amending Act [11] was passed, extending the principle of preservation to the eggs of

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[1] Bell, Prin. 974; *R.* v. *Moore*, 1832, 3 B. & Ad. 184.
[2] Bell, Prin. 1290.
[3] Stair, ii. 3, 68 and 76; Bankt. i. 3, 166.
[4] ii. 6, 15.
[5] See *Duke of Athole* v. *Macinroy*, 1862, 24 D. 673.
[6] 57 & 58 Vict. c. 24.
[7] *Harris* v. *Elder*, 1893, 57 J.P. 553.
[8] Barclay's Digest, *h.t.*
[9] 43 & 44 Vict. c. 35.
[10] 44 & 45 Vict. c. 51.
[11] 57 & 58 Vict. c. 24.

wild birds. A later Act of 1904 [1] applied the provisions of the Acts, with certain modifications, to St Kilda. A close time is provided for all wild birds from March 1 to August 1 (s. 3, Act 1880); and anyone who destroys or takes, or who attempts to destroy or take, wild birds between those dates, or who, after March 15, exposes for sale or is in possession of birds recently taken (s. 3), renders himself liable to be summarily prosecuted before the Sheriff (s. 5), and to a penalty of £1 for each bird and costs in the event of the bird taken or destroyed being one of the following, viz.: American quail, auk, avocet, bee-eater, bittern, bonxie, colin, cornish chough, coulterneb, cuckoo, curlew, diver, dotterel, dunbird, dunlin, eider duck, fern-owl, fulmar, gannet, goat-sucker, godwit, goldfinch, grebe, greenshank, guillemot, gull (except black-backed gull), hoopoe, kingfisher, kittiwake, lapwing, loon, mallard, marrot, merganser, murre, night hawk, night-jar, nightingale, oriole, owl, ox bird, oyster-catcher, peewit, petrel, phalarope, plover, plovers-page, pochard, puffin, purre, razorbill, redshank, reeve or ruff, roller, sanderling, sandpiper, scout, sealark, seamew, sea-parrot, sea-swallow, shearwater, shelldrake, shoveller, skua-smew, snipe, solan goose, spoon-bill, stint, stone curlew, stonehatch, summer snipe, tarrock, teal, tern, thick-knee, tystey, whaup, whimbrel, widgeon, wild duck, willock, woodcock, woodpecker (s. 3, and Schedule to the 1880 Act); and also larks (s. 2, Act 1881) and any other bird the Secretary of State may declare to be included in the Schedule to the 1880 Act, with respect to any district, on the application of the county council for that district (s. 3, Act 1894). The penalty for all other birds is a reprimand and costs for the first offence, and 5s. a bird and costs thereafter (s. 3, Act 1880).

836. When any person is convicted of an offence against the Wild Birds Protection Acts, 1880 to 1896, the Court may, in addition to any penalty which may be imposed, order any wild bird, or wild bird's egg, in respect of which the offence has been committed, to be forfeited and disposed of as the Court may think fit.[2] By later statutes penalties are imposed on any person who knowingly permits or causes the erection on any pole, tree, or cairn of stones or earth, any spring, trap, etc., calculated to cause bodily injury to any wild bird coming in contact with it,[3] or who takes wild birds by means of a hook or other instrument.[4]

837. No one is liable for exposing a bird for sale after March 15 who can satisfy the Court that the killing of the bird was lawful at the time when and by whom it was killed, or that it was killed in a place to which the Act does not extend (s. 1, Act 1881). The fact that the bird has been imported is *prima facie* evidence of this. Any person may require an offender against the Act to give his name and address; and if he refuse, or give a false name or address, an additional penalty of 10s. may be imposed (s. 4, Act 1880). Any offence on the

[1] 4 Edw. VII. c. 10.
[2] Wild Birds Protection Act, 1902, 2 Edw. VII. c. 6, s. 1.
[3] 2 Edw. VII. c. 6.
[4] 8 Edw. VII. c. 11.

sea beyond the Sheriff's jurisdiction is held to be committed in any county abutting said sea-coast; and where it is committed on water which bounds two counties, the offender may be prosecuted in either county (s. 6, Act 1880).

838. The Secretary for Scotland may, on the application of the County Council for any district who supersede the justices in quarter sessions, in terms of the Local Government Act, 1889,[1] extend the close time for that district (s. 8, Act 1880), or may prohibit the taking of eggs of any specified species, or of any species whatever (s. 2, Act 1894). Any order by the Secretary of State must be advertised in the local newspapers, and by the fixing of notices in public places (s. 4, Act 1894).

Section 9.—Cruelty to Animals.

Subsection (1).—*Common Law and Early Statutes.*

839. By the common law of Scotland, hurting or injuring animals might be prosecuted as malicious mischief. Hume and Alison mention cases where persons were punished for various acts of cruelty to animals.[2] There were two Acts passed in the reign of James VI.—the Act of 1581, c. 110, "against the schameful oppression of slaying and houching of oxen, horses, and other cattel," and the Act of 1587, c. 83. These Acts made the slaying or houghing of horses and oxen punishable with death. But they were passed merely to protect the property of the owners of the animals, especially during spring and harvest labour, when the horses and oxen were required for agricultural purposes.

Subsection (2).—*Protection of Animals Act*, 1912.

840. There were several enactments relating to Cruelty to Animals between 1850 and 1909, but the law was codified by the Protection of Animals (Scotland) Act, 1912,[3] which repealed all the former Acts except the Cruelty to Animals Act, 1876,[4] which relates to vivisection. The principal statute enacts (s. 1 (1)) that if any person shall cruelly beat, kick, illtreat, override, overdrive, overload, torture, infuriate or terrify any animal, or shall cause or procure, or being the owner permit any animal to be so used, or shall by wantonly or unreasonably doing or omitting to do any act, or causing or procuring the commission or omission of any act, cause any unnecessary suffering, or being the owner permit any unnecessary suffering to be caused to any animal, such person shall be guilty of an offence of cruelty to animals and be liable on summary conviction to a fine not exceeding £25, or alternatively, or in addition thereto, to be imprisoned with or without hard labour for any term not exceeding six months.

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[1] 52 & 53 Vict. c. 50, s. 11.
[2] Hume, i. 124; Alison, i. 450; Macdonald, 115.
[3] 2 & 3 Geo. V. c. 14.
[4] 39 & 40 Vict. c. 77.

841. It is also an offence to transport an animal in such a manner or position as to cause the animal any unnecessary suffering (s. 1 (1) B), or to cause, procure or assist at the fighting or baiting of an animal, or to keep, use, manage or assist in the management of premises for the exhibition of fights between animals (s. 1 (1) C). The administration of any poison or injurious drug to an animal without any reasonable cause or excuse is also an offence (s. 1 (1) D). The performance of a surgical operation upon an animal without due care and humanity is prohibited under penalty (s. 1 (1) E). The matter of operations upon animals is, however, more fully dealt with under the Animals (Anæsthetics) Act, 1919.[1]

842. The owner of an animal is deemed to have permitted cruelty if he shall fail to have exercised reasonable care and supervision in respect of the protection of the animal, provided that where the owner is convicted by reason of his failing to exercise due care and supervision he is not to be liable to imprisonment without the option of a fine (s. 1 (2)).

843. The Act does not apply (*a*) to the commission or omission of any act in the course of the destruction or the preparation for destruction of any animal as food of mankind unless such destruction or such preparation was accompanied by infliction of unnecessary suffering, or (*b*) to the coursing or hunting of any captive animal unless such animal is liberated in an injured, mutilated, or exhausted condition; but a captive animal shall not for the purposes of the section be deemed to be coursed or hunted before it is liberated for the purpose of being coursed or hunted, or after it has been recaptured, or when it is under control (s. 1 (3)). The captive animal shall not be deemed to be coursed or hunted within the meaning of the subsection if it is coursed or hunted in an enclosed space from which there is no reasonable chance of escape.[2] For the test of coursing see *Waters* v. *Meakin*.[3] The expression captive animal means any animal (not being a domestic animal) of whatsoever kind or species, and whether a quadruped or not, including any bird, fish, or reptile which is in captivity or confinement, or which is maimed, pinioned, or subjected to any appliance or contrivance for the purpose of hindering or preventing its escape from captivity or confinement (s. 13).

844. Where an owner is convicted of an offence against the Act the Court has power to direct that the animal shall be destroyed, and any reasonable expense in connection therewith may be ordered by the Court to be paid by the owner and shall be recoverable summarily as a civil debt. If the owner does not give his assent to the destruction of the animal, the destruction can only be ordered on evidence given by a duly registered veterinary surgeon (s. 2). Over and above the penalties mentioned above, the Court upon conviction may deprive a person of the ownership of the animal and may dispose of it as is thought proper.

[1] 9 & 10 Geo. V. c. 54. [2] 11 & 12 Geo. V. c. 22. [3] 1916, 25 Cox C.C. 432.

Such an order will not be pronounced unless it can be shewn that the animal if left with the owner is likely to be exposed to further cruelty (s. 3).

845. If anyone shall by cruelty, within the meaning of the Act, cause any damage to an animal or any person or property, he shall upon conviction for the cruelty be liable, upon the application of the person who sustained the damage, to pay as compensation such sum not exceeding £10 as the Court may adjudge. This provision does not prevent the person aggrieved taking any other legal proceedings or affect the liability of any person punished under the Act for an offence of cruelty (s. 4).

846. It is an offence, punishable on summary conviction by a fine not exceeding £10, to sell or expose for sale or give away any grain or seed which has been rendered poisonous except for *bona-fide* use in agriculture, or knowingly to put or place in or upon any land or building any poison or any fluid or edible matter (not being sown seed or grain) which has been rendered poisonous. It is a defence that the poison was placed for the purpose of destroying vermin where it is found to be necessary to do so in the interests of public health, agriculture, or preservation of other animals, or for the purpose of manuring the land, and that all reasonable precautions to prevent access thereto of dogs, cats, fowls, or other domestic animals had been taken (s. 7).

847. The use of dogs for the purpose of draught is forbidden under penalty of a fine not exceeding £2 for the first offence, and not exceeding £5 for a second or any subsequent offence (s. 8). Where any spring trap for the purpose of catching hares or rabbits is set, it must be inspected at reasonable intervals of time, and at least once every day between sunrise and sunset. Failure so to inspect is punishable by a fine not exceeding £5 (s. 9).

848. Where a police constable finds an animal so diseased or injured or in such a physical condition that there is no possibility of removing it without cruelty, he shall, if the owner is absent or refuses to consent to the destruction of the animal, at once summon a duly registered veterinary surgeon; and if it appears by the certificate of such veterinary surgeon that the animal is mortally injured, or is so severely injured or diseased or in such physical condition that it is cruel to keep it alive, the police constable may slaughter the animal with such appliances, and with such precautions and in such manner as to inflict no unnecessary suffering. Should the veterinary surgeon certify that the injured animal can be removed without cruelty, the person in charge shall cause it forthwith to be removed with as little suffering as possible, and if he fails to do so the police constable may without his consent cause the animal to be removed. Any expenses reasonably incurred by the police constable, including the expense of the fees of the veterinary surgeon, may be recovered from the owner as a civil debt (s. 10). Animal in this section means any horse, mule, ass, ox, sheep, goat, or pig.

849. A constable may apprehend without warrant any person whom he has reason to believe, whether upon his own view or upon a complaint or information of any person, to be guilty of an offence under the Act which is punishable by imprisonment without the option of a fine. Where a person having charge of a vehicle or animal is apprehended by a constable, the constable may take charge of such vehicle or animal and deposit it in some place of safe custody until the termination of the proceedings or until the Court shall give direction. The costs of such deposit and detention, along with the fees of the veterinary surgeon, may be recovered as a civil debt, or where the owner is convicted shall be part of the costs of the case (s. 11).

850. Where proceedings are instituted under the Act, the Court, after notice to any person (not being the owner) against whom proceedings are instituted, may issue a citation directing the owner of the animal to produce the animal for the inspection of the Court if such production is possible without cruelty, and if the owner fails to comply without a satisfactory excuse he is liable to a fine not exceeding £5 for the first offence, and not exceeding £10 for the second or any subsequent occasion, and may be liable to the costs of any adjournment rendered necessary by his failure (s. 12).

851. Animal in the Act, except where otherwise expressly provided, means any domestic or captive animal. Domestic animal means any horse, ass, mule, ox, sheep, pig, goat, dog, cat, or fowl, or any other animal of whatsoever kind or species, and whether a quadruped or not, which is tame or which has been or is being sufficiently tamed to serve some purpose for the use of man.

Subsection (3).—*What is Cruelty?*

852. It has been held in England that a person who performs with reasonable care and skill a painful operation on an animal for the purpose of benefiting the owner by increasing the value of the animal is not guilty of an offence against s. 2 of the Cruelty to Animals Act, 1845 [1] (which is in the same terms as s. 1 of the Act of 1850), even though the operation is in fact unnecessary and useless. The operation performed was spaying or cutting out the uterus and ovaries of sows.[2] Cutting cocks' combs was held to be a contravention of the above-mentioned section.[3] Branding lambs on the nose with a red-hot iron for the purpose of identification was held not to be an offence.[4] The exposure of a pony to performing lions inside a cage is cruelty.[5] Failure to dress the wounds of a sheep which was infected with maggots was held to be an offence,[6] as also failure to milk a cow which was overstocked and had been walked a distance of more than five miles.[7] A person was walking

[1] 12 & 13 Vict. c. 92.
[2] *Lewis* v. *Fermor*, 1887, 18 Q.B.D. 532.
[3] *Murphy* v. *Manning*, 1876, 2 Ex. D. 307.
[4] *Bowyer* v. *Morgan*, 1906, 95 L.T. 27.
[5] *Thielbar* v. *Craigen*, 1905, 21 Cox C.C. 44.
[6] *Potter* v. *Challans*, 1910, 22 Cox C.C. 302.
[7] *Waters* v. *Braithwaite*, 1913, 24 Cox C.C. 34.

with two small dogs; a large dog attacked the other two; the owner of the small dogs tried to pull the big one away from them, but having failed to do so, struck it twice with a knife, thereby inflicting two wounds, of which the dog died next day. It was held that his conduct did not amount to wanton cruelty within the meaning of s. 1 of the Act of 1850.[1] A conviction was quashed in a case where a person had been convicted under s. 1 of the Act for firing from a distance of five yards at a dog which had been trespassing after game in a field belonging to the employer of the accused.[2] A complaint under the Act, which set forth that the panel, a cab-driver, did cruelly ill-treat a horse under his charge by allowing it to remain yoked to his cab on a country road during a night in October, said horse suffering severely from hunger, cold, and exposure, was held relevantly libelled (*diss.* Lord Young).[3] An innkeeper's servant drove a pair of horses several journeys (in all about twenty miles) in a wagonette which held nineteen people. One of the horses shewed signs of distress, and the innkeeper ordered it to be changed to another wagonette holding twenty-four people, and which was drawn by three horses. The horse fell dead in the street after it had run nine miles in the second wagonette. It was held that the innkeeper was rightly convicted of cruelty to animals by over-driving.[4]

Subsection (4).—*Personal Knowledge of Accused.*

853. In a case where the owner of a horse was convicted, under s. 1 of the Act of 1850, for causing the horse to draw a cart when it was unfit to be worked from having an open sore beneath the saddle, the conviction was set aside because it was not proven that the accused had any knowledge of the condition of the horse at the time. It was being worked by the accused's servant at a place some miles distant from the residence of the accused.[5] On the other hand, a complaint against a butcher for contravention of the Act, which set forth that at a place where he conducted part of his business, and which was in the immediate neighbourhood of his residence, he ill-treated cattle, or caused or procured them to be ill-treated, by leaving them without food, was held relevant although it did not set forth personal knowledge of the facts complained of.[6] In an earlier case, where a person was charged with a contravention of the Act of a similar nature, the complaint was held irrelevant, in so far as there was no averment of knowledge on the part of the accused that the supply of food provided for sheep was insufficient.[7] The secretary of a limited company who had no concern with the horses belonging to the company was held not guilty of "causing

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[1] *Cornelius* v. *Grant*, 1880, 7 R. (J.C.) 13.
[2] *Jack* v. *Campbell*, 1880, 8 R. (J.C.) 1.
[3] *Anderson* v. *Wood*, 1881, 9 R. (J.C.) 6.
[4] *Carmichael* v. *Welsh*, 1887, 1 White, 333.
[5] *Wright* v. *Rowan*, 1890, 17 R. (J.C.) 29; cf. *Downie* v. *Fraser*, 1893, 30 S.L.R. 897.
[6] *Wilson* v. *Johnston*, 1874, 1 R. (J.C.) 16.
[7] *Sharp* v. *Mitchell*, 1872, 2 Coup. 273.

or procuring" a "horse to be cruelly ill-treated."[1] The intention to be cruel is immaterial if there is cruelty in fact.[2]

Subsection (5).—*Vivisection.*

854. Prior to 1876 there had been no law to regulate the practice of vivisection of animals for the purpose of scientific and medical research, but in that year an Act was passed which proceeded on the preamble that it is expedient to amend the law relating to cruelty to animals by extending it to the cases of animals which, for medical, physiological, or other scientific purposes, are subjected when alive to experiments calculated to inflict pain.[3] Sec. 2 prohibits painful experiments on animals, except subject to the restrictions imposed by this Act. Any person performing or taking part in performing any experiment calculated to give pain, in contravention of this Act, is liable to a penalty not exceeding £50 for the first offence, and for the second or any subsequent offence a penalty not exceeding £100 or imprisonment for a period not exceeding three months.

855. Sec. 3 lays down the following restrictions as to performance of painful experiments on animals:—

(1) The experiment must be performed with a view to the advancement by new discovery of physiological knowledge, or of knowledge which will be useful for saving or prolonging life or alleviating suffering; (2) the experiment must be performed by a person holding a licence from the Secretary of State, and in the case of a person holding such conditional licence as is hereinafter mentioned, or of experiments performed for the purpose of instruction, in a registered place; (3) the animal must during the whole of the experiment be under the influence of some anæsthetic of sufficient power to prevent it feeling pain; (4) the animal must, if the pain is likely to continue after the effect of the anæsthetic has ceased, or if any serious injury has been inflicted on the animal, be killed before it recovers from the influence of the anæsthetic which has been administered; (5) the experiment shall not be performed as an illustration of lectures in medical schools, hospitals, colleges, or elsewhere; and (6) the experiment shall not be performed for the purpose of attaining manual skill. Provided that: (1) Experiments may be performed under the foregoing provisions as to the use of anæsthetics by a person giving illustrations of lectures in medical schools, hospitals, colleges, or elsewhere, on a certificate being given as provided in the Act that the proposed experiments are absolutely necessary for the due instruction of the persons to whom such lectures are given, with a view to their acquiring physiological knowledge, or knowledge which will be useful to them for saving or prolonging life or alleviating suffering; (2) experiments may be performed without

[1] *Hughes* v. *Mooney*, 1909, 43 Ir. L.T. 127. [2] *Duncan* v. *Pope*, 1899, 19 Cox. C.C. 241.
[3] Cruelty to Animals Act, 1876 (39 & 40 Vict. c. 77).

anæsthetics on a certificate being given that insensibility cannot be produced without necessarily frustrating the object of such experiments; (3) experiments may be performed without the person who performed such experiments being under an obligation to cause the animal on which any such experiment is performed to be killed before it recovers from the influence of the anæsthetic, on a certificate that the so killing the animal would necessarily frustrate the object of the experiment, and provided that the animal be killed as soon as such object has been attained; (4) experiments may be performed not directly for the advancement by new discovery of physiological knowledge, or of knowledge which will be useful for saving or prolonging life or alleviating suffering, but for the purpose of testing a particular former discovery alleged to have been made for the advancement of such knowledge as last aforesaid, on a certificate that such testing is absolutely necessary for the effectual advancement of such knowledge.

856. Notwithstanding anything in the Act, an experiment calculated to give pain shall not be performed without anæsthetics on a dog or cat, except on a certificate being given as mentioned in the Act, stating that for reasons specified in the certificate the object of the experiment will be necessarily frustrated unless it is performed on an animal similar in construction and habits to a cat or dog, and no other animal is available for such experiment; and an experiment calculated to give pain shall not be performed on any horse, ass, or mule, except on a certificate that the object of the experiment will be necessarily frustrated unless it is performed on a horse, ass, or mule, and that no other animal is available for such experiment (s. 5). Public exhibition of painful experiments on animals is prohibited, under a penalty not exceeding £50 for the first offence, and not exceeding £100 or imprisonment for a period not exceeding three months for the second offence. Any person publishing an advertisement of any such intended exhibition is liable to a penalty not exceeding £1 (s. 6). A person punished for an offence under this section is not for the same offence punishable under any other section of this Act.

857. Provision is made for the granting of licences to perform experiments upon animals, for registering places where such experiments may be performed, and for reports to and inspections by order of the Secretary of State (ss. 7 to 11). A judge may grant a licence for experiments on living animals in any case where he is satisfied that it is essential for the purposes of justice in a criminal case to make any such experiments (s. 12).

858. In Scotland, offences against this Act may be prosecuted and penalties recovered under the provisions of the Summary Jurisdiction Act of 1908, but a person accused of an offence in respect to which he would be liable to a penalty of more than £5 may object to be tried before a Court of summary jurisdiction, in which case proceedings may be taken against him on indictment before the High Court of Justiciary in Edinburgh, or the Circuit Court. No prosecution against a licensed

person shall be instituted except with the assent in writing of the Secretary of State (s. 21). The Act does not apply to invertebrate animals (s. 22). This Act has not been the subject of decision either in the High Court of Justiciary or in the King's Bench Division in England.

859. Under the Dogs Act, 1906[1] (s. 3 (5)), stray dogs seized under this Act must not be given or sold for the purposes of vivisection.

860. A director of research laboratories holding a licence administered a drug to an ass which produced paralysis without pain. The animal was stationed in a field for some days during very hot and dry weather, and eventually became so weak that it was unable to protect itself from flies. At the end of the experiment the animal was destroyed. A prosecution under the English Cruelty to Animals Act, 1911, was brought against the director for having caused the animal unnecessary suffering. After proof the Justices dismissed the complaint, holding that the animal did not suffer unnecessarily. An appeal was refused in respect that the question was one of fact for the Justices.[2]

Subsection (6).—*Operations on Animals.*

861. The Animals (Anæsthetics) Act, 1919,[3] provides that if any person shall subject or cause or procure or, being the owner, permit to be subjected, an animal to an operation contrary to the regulations contained in the Act, he shall be guilty of an offence and liable on summary conviction in respect of a first offence to a fine not exceeding £5, and in respect of any second or subsequent offence to a fine not exceeding £25, or alternatively, or in addition thereto, to imprisonment for a term not exceeding three months. A horse or dog, cat, or bovine animal, must not be subjected to any of the following operations:—*Horses*—operation for quittor; stripping the wall or sole of the hoof; poll evil; fistulous withers; ovariotomy; laparotomy; amputations of penis, mamma, uterus; extraction of permanent molar teeth; operations for scrotal and inguinal hernia; operations for scirrhous cord or extensive tumours: *Dogs and Cats*—castration in animals six months old and upwards; ovariotomy; laparotomy; amputations of penis, mamma, uterus; operations for scrotal and inguinal hernia: *Bovines*—ovariotomy; operations for actinomycosis; laparotomy; amputations of penis, mamma, uterus; dishorning cattle over one month old—unless the animal during the whole of the operation is under the influence of some general anæsthetic (s. 1 (2) (*a*) and Schedules 1, 2, and 3). A horse, dog, cat, or bovine shall not be subjected to any of the following operations:—*Horses*—neurectomy or unnerving; enucleation of the eyeball; line and point firing; operation for umbilical hernia; urethrotomy; docking of the tail; trephining: *Dogs and Cats*—enucleation of the eyeball; operation for umbilical hernia; urethrotomy; docking of the tail and clipping or rounding of ears of animals over six months

[1] 6 Edw. VII. c. 32. [2] *Dee* v. *Yorke*, 1914, 78 J.P. 359. [3] 9 & 10 Geo. V. c. 54.

old: *Bovines*—enucleation of the eyeball; operation for umbilical hernia; rumenotomy; urethrotomy; trephining—unless during the whole operation the animal is under the influence of some general anæsthetic or local anæsthetic (s. 1 (2) (*b*) and Schedules 4, 5, and 6). In either case the anæsthetic must be sufficient to prevent the animal feeling pain.

862. The Board of Agriculture may by order add any other operation to the operations specified in these schedules, or they may extend any provision of the Act to any domestic animal to which it does not at this time apply. Further, the Board may declare any substance to be a suitable general or local anæsthetic for the purposes of the Act. So far the Board of Agriculture have made no amendments to these schedules. This Act does not apply to experiments to which the Cruelty to Animals Act, 1876, applies. (Vivisection.)

Subsection (7).—*Cock-fighting.*

863. This sport is now prohibited in Scotland, under penalties, by the Protection of Animals (Scotland) Act, 1912[1] (s. 1 (6)), which makes it an offence to cause, procure, or assist at the fighting or baiting of any animal, or to keep, use, manage, or act or assist in the management of, any premises or place for that purpose, or to receive, or cause or procure any person to receive, money for the admission of any person to such premises or place. The penalty is a fine not exceeding £25, or alternatively, or in addition thereto, imprisonment, with or without hard labour, for any term not exceeding six months.[2]

864. The previous history of legislation and decision on the subject may be briefly stated. The Cruelty to Animals (England and Ireland) Act, 1849,[3] and the Cruelty to Animals (Scotland) Act, 1850,[4] each contained a general provision against cruelty to animals in almost similar terms, making it an offence inferring a penalty of £5 for any person to "cruelly beat, ill-treat, overdrive, abuse, or torture, or cause or procure to be cruelly beaten, ill-treated, overdriven, abused, or tortured, any animal," and defined the word animal to be "taken to mean any horse, mare, gelding, bull, ox, cow, heifer, steer, calf, mule, ass, sheep, lamb, hog, pig, sow, goat, dog, cat, or any other domestic animal." These Acts also each contained a provision making it an offence to "keep or use or act in the management of any place for the purpose of fighting or baiting any bull, bear, badger, dog, cock, or other kind of animal, whether of domestic or wild nature," or to "encourage, aid, or assist at the fighting or baiting of any bull, bear, badger, dog, cock, or other animal as aforesaid." The Court of Queen's Bench in 1863 held, in the case of *Budge*,[5] that to assist in fighting cocks, except in a place kept for the purpose, was not an offence under the latter section, but, in the second case of *Budge*,[6] that to set a cock to fight

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[1] 2 & 3 Geo. V. c. 14.
[2] See para 841, *supra*.
[3] 12 & 13 Vict. c. 92.
[4] 13 & 14 Vict. c. 92.
[5] 3 B. & S. 379.
[6] *Ibid.*, 382.

another after the other has been disabled by its thigh-bone being broken, was an offence against the general section against cruelty. The Court of Justiciary in Scotland, in the case of *Brown* v. *Renton*,[1] followed the first case of *Budge* in holding that the section against cock-pits did not apply to cock-fighting in places not kept for the purpose; but in the case of *Johnstone & Others* v. *Abercrombie*,[2] the same Court, sitting with a full Bench, refused to follow the second case of *Budge*, holding that the definition of animal in the Act of 1850 did not include a cock, and accordingly that cock-fighting was not struck at by the general enactment against cruelty. The Cruelty to Animals (Scotland) Act, 1895,[3] amended the definition of "animal" in the Act of 1850 by adding the words "or any game or fighting cock or other domestic fowl or bird," and made it penal to assist at a cock-fight; and the Act of 1912, which repealed the Act of 1895, included in the definition of animal any domestic animal including any fowl. It is proper to notice that, while the decision in *Budge* proceeded on an interpretation of the definition of "animal" in the Act of 1849, against which much may be urged, that definition had at that date been amended by the English Act of 1854,[4] which was not cited in the case, and which extended the definition of animal so as to include animals whether quadrupeds or not. These cases are, in view of the provisions of the Protection of Animals (Scotland) Act, 1912, of no material importance.

Section 10.—Vermin.

Subsection (1).—*Rats and Mice.*

865. Any person who fails to take such steps as may from time to time be necessary and reasonably practicable for the destruction of rats and mice on or in any land of which he is occupier, or for preventing such land from becoming infested with rats and mice, is liable on summary conviction to a fine not exceeding £5.[5] Provision is made in this Act for the Local Authority giving instructions for the most effective methods to be adopted both individually and collectively with a view to the destruction of rats and mice. The Local Authority having power to enforce the Act may serve a notice on the occupier of land requiring him to take such steps as are necessary for the destruction of the vermin, and failure to observe such notice involves a penalty not exceeding £20. The Act also applies to a vessel as if the vessel were land, and the master of the vessel is deemed to be the occupier. Notice may be served upon the master. The expression "occupier" means, in the case of land not occupied by any tenant or other person, the owner of the land; and the expression "land" includes any buildings and any other erection on land, and any cellar, sewer, drain, or culvert in or under the land.

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[1] 1891, 3 White, 83; 19 R. (J.C.) 22.
[2] 1892, 3 White, 432; 20 R. (J.C.) 37.
[3] 58 Vict. c. 13.
[4] 17 & 18 Vict. c. 60.
[5] Rats and Mice (Destruction) Act, 1919 (9 & 10 Geo. V. c. 72).

Subsection (2).—*Foxes.*

866. Being considered as destructive vermin, foxes may be pursued, by persons injured, over the lands of others.[1] If any damage is done in the pursuit, the pursuer is liable. A distinction is drawn between pursuing foxes for purposes of public utility and hunting for amusement. In the latter case a person is no more entitled to enter the property of another in pursuit of a fox than in pursuit of a hare or a partridge.[2]

Section 11.—Contagious Diseases of Animals.

Subsection (1).—*General.*

867. The enactments relating to the prevention and suppression of contagious diseases in animals are consolidated by the Diseases of Animals Act, 1894,[3] as amended by the subsequent Acts of 1896,[4] 1903,[5] 1909,[6] and 1910;[7] the Poultry Act, 1911;[8] and the Exportation of Horses Act, 1914.[9] The enactments deal generally with the law and regulations relating to (1) the following contagious and infectious diseases among animals, viz. Anthrax, cattle plague, foot-and-mouth disease, glanders or farcy, epizootic lymphangitis, pleuro-pneumonia, rabies, sheep-pox, sheep-scab, and swine fever; (2) the transit of animals; (3) markets; (4) importation of animals; (5) disinfection; and (6) importation of foreign hay and straw.

Subsection (2).—*Authorities to Administer the Acts.*

868. The central controlling body is the Board of Agriculture, exercising the powers and duties conferred upon it by this Act and the Board of Agriculture Act, 1889[10]—(s. 1). The Local Authorities subject to the control of the Board are: (*a*) for burghs to which s. 14 of the Local Government (Scotland) Act, 1889, does not apply, the magistrates and town council; (*b*) for counties, and burghs to which the aforesaid section applies, and royal burghs not returning or contributing to return a member to Parliament, the county council (ss. 2, 60 (1)).

Subsection (3).—*Separation of Diseased Animals.*

869. Every person in possession or charge of a diseased animal must (*a*) keep it separate from uninfected animals; (*b*) give immediate notice to the police, who must inform such authority as the Board may direct.

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[1] *Colquhoun* v. *Buchanan*, 1785, Mor. 4997.
[2] *Marquis of Tweeddale* v. *Dalrymple*, 1778, Mor. 4992; Blair's Justices' Manual, 87, 88; Hutcheson's Justice of the Peace, iv. 12, s. 4 (vol. ii. p. 567).
[3] 57 & 58 Vict. c. 57.
[4] 59 & 60 Vict. c. 15.
[5] 3 Edw. VII. c. 43.
[6] 9 Edw. VII. c. 26.
[7] 10 Edw. VII. & 1 Geo. V. c. 20.
[8] 1 & 2 Geo. V. c. 11.
[9] 4 & 5 Geo. V. c. 15.
[10] 52 & 53 Vict. c. 30.

The onus of proof of notice to the police lies on the owner.[1] Orders may be made by the Board as to notices, etc., to be given, and for supplementing or varying this section (s. 4).[2]

Subsection (4).—*Cattle Plague.*

870. Where an inspector believes that cattle plague exists, or has within ten days existed, in any place, he is to sign a declaration, and serve a notice thereof on the occupier: thereupon that place and adjacent lands, etc., become an infected place, subject to the determination of the Board. He may also serve a notice on the occupiers of all lands within a mile: thereupon such lands become part of the infected place, subject as aforesaid. He must also send to the Board and Local Authority his declaration and notices. The Board, after inquiry, may by order prescribe the limits of the infected place, or may declare the place uninfected. The Board may at any time, by order, declare any place to be infected, may alter the limits of an infected place, or may declare an infected place to be free from cattle plague (s. 5). The Board may, by order, declare any area wherein an infected place is situate to be infected; may alter the limits of such area; or declare an infected area to be free from cattle plague (s. 6). They *must* cause to be slaughtered (i) all infected animals ; (ii) all animals having been in contact with such : and *may* cause to be slaughtered (i) any animals suspected of infection, or in an infected place; (ii) any animals within such parts of an infected area as are not an infected place (subject to Treasury Regulations).

Compensation is to be paid for an infected animal, half its value before infection, not exceeding £20; in every other case, the value of the animal before slaughter, not exceeding £40 (s. 7).

Subsection (5).—*Infected Areas, etc., for Diseases Generally.*

871. Where an inspector of a Local Authority believes that pleuro-pneumonia exists, or has within fifty-six days existed, or that foot-and-mouth disease exists, or has within ten days existed in any place, he must sign a declaration and serve a notice upon the occupier ; in case of foot-and-mouth disease, also on the occupier of such adjacent lands as he thinks necessary. Thereupon the place becomes an infected place, subject to the determination of the Local Authority. He must also send his declaration and notice to the Board and Local Authority. The latter, after inquiry, with advice of a veterinary inspector, may define the limits of the infected place, and may include adjacent lands therein. They may include part of the adjoining district of another Local Authority, with the written consent of the latter; or they may

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[1] *Higgins* v. *Ward*, 1873, L.R. 8 Q.B. 52 ; see also *MacLean* v. *Laidlaw*, 1909 S.C. (J.) 68 ; *Clarke* v. *Wood*, 1900, 2 F. (J.) 62.

[2] See *Robertson* v. *Perthshire Local Authority*, 1883, 10 R. (J.) 68.

declare the place to be free from disease. They must report to the Board the inspector's declaration and their proceedings, with their opinion what area, if any, should be declared infected; and state whether the holding of any fair or market should be prohibited or restricted therein. This section is to be construed subject to s. 21.[1] Where a Local Authority have declared a place to be infected with pleuro or foot-and-mouth disease, they may, on the advice of a veterinary inspector, declare such place to be free from disease: in the former case, not sooner than fifty-six days after its cessation; in the latter, fourteen days, or such period not exceeding twenty-eight days as the Board may by general order prescribe. The Board may by order declare any place to be infected with pleuro or foot-and-mouth disease; may alter the limits of such place; or declare an infected place to be free from disease (s. 8).

872. The Board may declare any area wherein an infected place is situate to be an infected area; may extend the limits of such area; or, where no infected place exists within such area, may declare it, or part of it, to be free from disease. They may also prohibit or restrict the holding of markets, etc., within an infected area (s. 9). The Board may make provision for declaring places and areas infected with a disease other than those already named, and every place and area so declared infected is to be an infected place or area. They may cancel any declaration made in error regarding any infected place. Where a place or area is declared free from disease, or a declaration is cancelled, such place or area ceases to be infected. An order of the Board or Local Authority, declaring an infected area or place, or declaring such to be free from disease, is conclusive evidence of the facts whereon the order proceeds (s. 10).

Subsection (6).—*Movement of Animals.*

873. Cattle must not be moved into, within, or out of a place or area infected with pleuro, except in accordance with Schedule I. Part I.; and animals must not be moved with reference to a place or area infected with foot-and-mouth disease, except in accordance with Schedule I. Part II. (s. 11).[2] Schedule I. Part I. provides: (1) Cattle may not be moved into or out of a place infected with pleuro, except where, as regards movement into such place, they are infected, and except in cases excepted by the Board. (2) In excepted cases, movement must be on conditions prescribed. (3) The Local Authority may license movement as to parts of an infected area, not being an infected place. Part II. is in similar terms, substituting "animals" for cattle, and "foot-and-mouth disease" for pleuro-pneumonia.

874. Where the Board, by order, declare that this section shall apply in the case of any disease, and any place is declared by an inspector to be infected with that disease, the whole space within

[1] See s. 877 *infra*.

[2] *Dunlop* v. *Weir*, 1888, 16 R. (J.) 14; 2 White 115.

half a mile from any part of the infected place becomes an infected circle; but the Board may limit the application of their order to a particular district. Where the place ceases to be infected, the infected circle is dissolved. The Board may make orders for giving notice of, and for limiting and dissolving, infected circles, and for prohibiting or regulating the movement of animals with reference thereto, or for authorising a Local Authority to make such regulations. Where two or more infected circles overlap, the whole is deemed to be one circle (s. 12).

The owner or person in charge of any animals in an infected place or area may exclude strangers from his buildings or enclosures by notice affixed thereto (s. 13).

SUBSECTION (7).—*Slaughter.*

(i) *Pleuro-Pneumonia, Foot-and-Mouth Disease, and Swine Fever.*

875. The Board *must* cause to be slaughtered all cattle affected with pleuro-pneumonia. They *may* cause to be slaughtered (*a*) any cattle suspected of being so affected; (*b*) any cattle which have been in contact with infected cattle, or have been exposed to infection. Compensation is to be paid (*a*) for an infected animal, three-fourths of its value before infection, not exceeding £30; (*b*) in every other case, its value before slaughter, not exceeding £40. The owner may by written notice require the animal to be slaughtered within twenty-one days (s. 14). The Board *may* cause to be slaughtered (*a*) any animals affected with foot-and-mouth disease, or suspected of being so affected; (*b*) any animals which have been in contact with infected animals, or have been exposed to infection. Compensation is to be paid (i) for an infected animal, its value before infection; (ii) in every other case, its value before slaughter (s. 15). The Board have powers with respect to swine fever similar to those just quoted with respect to foot-and-mouth disease; but the compensation for an animal affected with swine fever is a half of its value before infection; in every other case, its value before slaughter (s. 16).

The Board may appoint such additional officers as may be necessary for executing the provisions regarding slaughter (s. 17). Provision is made as to costs to be paid out of the Pleuro-Pneumonia Account (s. 18).

(ii) *Disease, and Compensation Generally.*

876. With respect to diseases other than cattle plague, the Board may make orders authorising the slaughter of animals by Local Authorities, and the payment of compensation out of local rates; and may authorise the slaughter of animals suspected of infection, or having been in contact with or exposed to infection (s. 19). They may reserve for treatment and observation any animal liable to slaughter, subject to payment of compensation. The carcass of a slaughtered animal belongs to the Board or Local Authority, and is to be disposed of by them. Where it

is sold by a Local Authority, the money is to be credited to the local rate. If the sum received by the Board or Local Authority exceeds the amount paid for compensation, the excess, after deducting reasonable expenses, is to be paid to the owner. A carcass may be buried in the owner's ground, or in any common or unenclosed land, but not in such land by a Local Authority without the approval of the Board. Where the animal was insured, the insurers may deduct the compensation paid from the amount payable under the insurance. A Local Authority must keep a record relative to slaughter, which is to be admitted in evidence. The Board or a Local Authority may withhold, wholly or partially, compensation in respect of an animal slaughtered, where the owner or person in charge has in their judgment been guilty, in relation to the animal, of an offence against the Act; or where, in the case of a foreign animal, it was in their judgment diseased at the time of its landing (s. 20). The decision of a Local Authority refusing compensation is not subject to review; but they must find and determine that an offence has been committed, and record the same in their minutes. It is not necessary that the outbreak of disease should be traceable to the offence.[1]

Subsection (8).—*Exceptional Powers for Transit, etc.*

877. The Board are to make, by order, such further provision as may be necessary respecting animals affected with pleuro-pneumonia or foot-and-mouth disease, while (i) exposed for sale or exhibited in a market, etc.; (ii) placed in a lair, etc., before exposure for sale; (iii) in transit or being moved by land or water; (iv) in a foreign animals wharf or quarantine station; (v) in a slaughter-house or place where animals are kept for slaughter; (vi) in common or unenclosed land; (vii) generally, in a place not in the possession or under the control of their owner. By such orders, provision is to be made for the consequences of animals being found in the aforesaid circumstances, with power to the Board to make orders with regard to particular places. Every such order is to have effect, notwithstanding any provision requiring the declaration of a place infected with pleuro-pneumonia or foot-and-mouth disease, or any other provision (s. 21).

Subsection (9).—*Disease and Movement Generally.*

878. Full powers are given to the Board to make regulations for carrying out the purposes of the Act, to which reference may be made for details. They include regulations for movement of animals in infected places and areas, disinfection, disposal of carcasses, mode of reckoning compensation, holding of markets and fairs,[2] care of animals

[1] *Calder* v. *Local Authority of Linlithgow*, 1890, 18 R. 48.

[2] Under the regulations as to markets it has been held that hawking of swine is not "holding a sale" (*M'Lean* v. *Monk*, 1897, 18 Cox, C.C. 686).

during transit, muzzling, etc., of dogs, extending the Act to other diseases or animals, etc. (s. 22). Railway companies must make provision of water and food for animals carried, to the satisfaction of the Board, and must supply the same on request.[1] Where a request for water is not made, so that an animal is without water for twenty-four hours, the consignor and person in charge are each guilty of an offence, the onus of proof lying on the accused; but the Board may prescribe any other period not less than twelve hours. Such charges for food and water supplied, as are approved by the Board, may be recovered either from consignor or consignee, the company having a lien over the animal supplied, or any other animal consigned by or to the same consignor or consignee (s. 23).

SUBSECTION (10).—*Foreign Animals.*

Slaughter at Port of Landing.

879. By Schedule III. Part I., such animals may be landed only at a foreign animals wharf, as defined by the Board, and subject to the control of the Commissioners of Customs; and they may not be moved alive out of the wharf. These regulations apply to all foreign animals other than (*a*) foreign animals prohibited from landing by the Board; (*b*) foreign animals intended for exhibition or exceptional purposes, allowed to land by the Board, subject to Schedule III. Part II. (quarantine)—(Diseases of Animals Act, 1896, repealing s. 24). The Board may make orders prohibiting the landing of animals, carcasses, fodder, etc., from a specified foreign country; and they must prohibit the landing of such, whenever they are not satisfied that the circumstances afford reasonable security against the importation of foot-and-mouth disease (s. 25). Sec. 26 is repealed, as from 1st January 1897, by the Diseases of Animals Act, 1896. Notwithstanding anything in the Act, or in any order of the Board, they may permit animals intended for exhibition or exceptional purposes to be landed, without being subject to the provisions of Schedule III. Part I. (slaughter at port of landing); but Part II. (quarantine) is to apply to such animals (s. 27). With regard to animals brought from the Channel Islands or Isle of Man, the Board may, by order or by licence, alter or add to the provisions of Schedule III. (s. 28). Every order relating to the landing or conveyance of foreign animals must be laid before Parliament (s. 29). Detailed powers are given to the Board to make orders for the execution of the Act with reference to foreign animals, the regulation of ports, etc. (s. 30 (1)). No part of a port may be declared an infected place, except by the Board (s. 30 (2)). Where any part of the district of a Local Authority coincides with a port, the Board may, in relation to that port, make any body, other than the Local Authority, to be the Local Authority for the purposes of the Act relating to foreign animals, and may prescribe the local rate and the clerk (s. 20.)

[1] *Johnson* v. *Colam*, 1875, 44 L.J., M.C. 185.

SUBSECTION (11).—*Sheep Scab.*

880. The Diseases of Animals Act, 1903,[1] confers on the Board of Agriculture power to make orders for prescribing, regulating, and securing the periodical treatment of all sheep by effective dipping or by the use of some other remedy for sheep scab. An inspector of the Board, and, if so authorised by an order of the Board, an inspector of the Local Authority, may, subject to the direction of the authority appointing the inspector, and for the purposes of any order or regulation under the Act, enter any premises and examine any sheep thereon (s. 2). The Local Authority may provide portable dipping tanks, or, with the sanction of the Board of Agriculture, dipping places, and afford the use thereof, and of all necessary appliances and materials in connection therewith, to the public upon such terms and conditions as the Local Authority may think fit. Sums received for such use must be applied by the Local Authority towards the discharge of their expenses under the Diseases of Animals Act, 1894 (s. 3). No dipping place, however, is to be used as above, if such use would injuriously affect the water in any stream, reservoir, aqueduct, well, pond, or place constructed or used for the supply of water for drinking or other domestic purposes (*ibid.*).

SUBSECTION (12).—*Live Poultry.*

881. The Diseases of Animals Act, 1894, was amended by the Poultry Act, 1911,[2] to enable the Board of Agriculture and Fisheries to make orders under s. 22 of the principal Act (*a*) for the purpose of protecting live poultry from unnecessary suffering while being conveyed by land or water, and in connection with the exposure for sale and their disposal after sale; and (*b*) for requiring cleansing or disinfection of receptacles or vehicles used for the conveyance of live poultry. The expression "poultry" includes domestic fowls, turkeys, geese, ducks, guinea-fowls and pigeons. The Board have accordingly issued an order, dated 15th July 1919, with regard to the protection of poultry during conveyance by water and by railway, and for their protection during conveyance by road or disposal for sale. Regulations were at the same time made with regard to the conveyance of unfit poultry, the use of unsuitable receptacles, the handling and cleansing of receptacles, and also the confining of poultry for any unnecessary time; provision was also made for the feeding of poultry in exceptional circumstances.

SUBSECTION (13).—*General Provisions as to Local Authorities.*

(i) *Committees.*

882. The provisions in Schedule IV., which deal with the appointment of committees by Local Authorities, are to have effect, without prejudice

[1] 3 Edw. VII. c. 43. [2] 1 & 2 Geo. V. c. 11.

to the power of a county council to delegate their powers under s. 73 of the Local Government (Scotland) Act, 1889: Provided that the Board, in any order authorising a Local Authority to make regulations, may direct that such power be exercised only by the Local Authority or their executive committee (ss. 31, 60 (6)).

(ii) *Wharves, etc.*

883. A Local Authority may provide wharves, sheds, etc., for the landing and disposal of foreign animals and things. The Markets and Fairs Clauses Act, 1847 [1] (certain sections excepted), is incorporated with this Act; and a wharf provided by a Local Authority under this section is a market within the said Act: the prescribed limits are to be the limits of the lands acquired for purposes of this section; and bye-laws are to be approved by the Board, after publication. A Local Authority may charge for the use of such wharf, in accordance with said bye-laws, and sums so received are to be applied in payment of interest on money borrowed under the previous Acts and this Act, repayment of principal, and expenses under the Act. The Local Authority are to make such returns of expenditure and receipts, in respect of the wharf, as the Board may require. The Board, if satisfied that the tolls should be reduced, may require a Local Authority to submit a new schedule of tolls, and on failure may, by order, prescribe new tolls. This section is to apply to a wharf provided by a Local Authority under the previous Acts (s. 32).[2] A Local Authority may purchase or lease land for wharves, or for burial of carcasses, where there is no land suitable belonging to the owner of the animal, or any common or unenclosed land approved by the Board, or for any other purpose; and they may dispose of lands so acquired, carrying the money received to the credit of the local rate.

(iii) *Purchase of Land.*

884. With respect to the purchase of land by a Local Authority, s. 90 of the Public Health (Scotland) Act, 1867 [3] (now superseded by s. 145 of the Act of 1897 [4]) is to apply, substituting the local authority and local rate under this Act for those therein mentioned; and the powers conferred may be exercised with respect to land without the district of the Local Authority (ss. 33, 61). Where a Local Authority fail to execute any of the provisions of the Act, or of an order of the Board, the latter may by order empower a person to do so. Expenses so incurred, including compensation for animals slaughtered, may be recovered with costs from the Local Authority at the instance of the Board, an order of the Board being conclusive as to default or other matter stated therein. This section is without prejudice to the right of the Board or any other authority to take proceedings for requiring

[1] 10 & 11 Vict. c. 14. [2] *Scott* v. *Glasgow Town Council*, [1899] A.C. 470, 68 L.J., M.C. 98.
[3] 30 & 31 Vict. c. 101. [4] 60 & 61 Vict. c. 38.

a Local Authority to execute the Act, or an order of the Board (s. 34).

(iv) *Officers.*

885. Every Local Authority must appoint sufficient inspectors and officers: they must keep at least one veterinary inspector, and as many more as the Board may require: an inspector may be removed, on the orders of the Board, for incompetence, negligence, or misconduct (s. 35). The Local Authority is not liable for the negligence of an inspector.[1] Every Local Authority and their officers must send such reports and information to the Board as they may require (s. 36). An order or regulation of a Local Authority may be proved by production of (i) a newspaper containing said order as an advertisement; or (ii) a copy certified by the clerk of the Local Authority. An order so proved is to be held duly made, until the contrary is proved. An order or regulation of a Local Authority authorised by the Act, or by an order of the Board, is alone to be deemed an order of the Local Authority (s. 37). The powers conferred on a Local Authority by the Act, unless otherwise expressed, are to be confined to their district (s. 38).

(v) *Transfer of Powers, etc.*

886. Where the district of one Local Authority has a common boundary with another, the two Local Authorities may agree in writing that one shall administer the Act within the district of the other; the expenses are to be allocated in proportion to the value, according to the Valuation Roll, of the surrendered district as compared with the value of the original area of the administering authority. The district or part thereof surrendered is to be deemed part of the district of the administering authority, and expenses paid by a surrendering authority are to be paid out of the local rate. Where the surrendering authority is a burgh, and the administering authority a county, to the rate of which such burgh is assessed, the provision for payment by the county to the burgh of the proportionate amount paid by the parishes in the burgh is not to apply. One Local Authority may agree in writing with another for the appointment of a joint-committee to exercise all or any of their respective powers in the whole part of their respective districts; and expenses incurred by such joint-committee are to be allocated in proportion to the value of the component areas, and paid out of their respective local rates. Such an agreement must receive the sanction of the Board. The expression "powers" in this section means all powers except making and levying a rate (ss. 39, 60 (5)).

(vi) *Expenses.*

887. The expenses of a Local Authority under the Act are to be defrayed out of the local rate; and the necessary sums are to be levied

[1] *Stanbury* v. *Exeter Corporation*, [1905] 2 K.B. 838.

with and as part of the local rate. The local rate is: (*a*) in burghs to which s. 14 of the Local Government (Scotland) Act, 1889, does not apply, a rate to be levied equally upon owners and occupiers; (*b*) in counties, and burghs to which the aforesaid section applies, and royal burghs not returning or contributing to return a member to Parliament, a rate within the county to be levied equally upon owners and occupiers as an item of the consolidated county rates, and within such burghs and royal burghs to be ascertained, fixed, and paid to the county council as provided by the aforesaid Act (ss. 40, 60 (1)).[1]

(vii) *Borrowing Powers.*

888. Where the amount required exceeds sixpence in the pound, a Local Authority may borrow at interest on the credit of the local rate, and may mortgage the same for repayment with interest for any term not exceeding seven years. Where the amount exceeds ninepence in the pound, the Secretary for Scotland may extend the term to any period not exceeding fourteen years. As regards borrowing by Local Authorities of counties, the provisions of the Local Government (Scotland) Act, 1889,[2] are to apply, and in the case of Local Authorities of burghs the provisions of the Commissioners Clauses Act, 1847,[3] with respect to the mortgages to be executed by the Commissioners, are to be deemed incorporated with the Act; and any mortgagee or assignee may enforce payment of his principal and interest by appointment of a judicial factor. The Public Works Loan Commissioners may, on the recommendation of the Secretary for Scotland, advance money to a Local Authority in manner provided by the Public Works Loans (Money) Act, 1875,[4] and any amending Act, the money to be repaid within the aforesaid term. A Local Authority may give as security, either with the local rate or separately, the wharf charges authorised herein, and any other funds otherwise unappropriated by law, in which case the limitations respecting the amount of rate and term of years are not to apply (ss. 42, 62).

Subsection (14).—*Police.*

889. The police force of each police area are to enforce the Act and orders of the Board. A constable may detain a person found committing, or reasonably suspected of committing, an offence, and may apprehend such person, if unknown, or failing to give his name and address; and he may detain and examine any animal, vehicle, boat, or thing relating to such offence, and require the same to be taken back to the place wherefrom it was unlawfully removed. Any person obstructing an officer may be apprehended without warrant. Any person apprehended under this section must be taken at once before a justice, and not detained without a warrant longer than necessary, subject to any

[1] See also 59 & 60 Vict. c. 37; and 61 & 62 Vict. c. 56, s. 2.
[2] 52 & 53 Vict. c. 50. [3] 10 & 11 Vict. c. 16. [4] 38 & 39 Vict. c. 58.

enactments relating to the release of persons on recognisances taken by a police officer. These provisions respecting a constable extend to any person called by him to his assistance. Wherever a constable stops any person, animal, etc., he must report his proceedings to his superior officer in writing. Nothing herein is to abridge the powers of a constable apart from this section (s. 43).

SUBSECTION (15).—*Powers of Inspectors.*

890. An inspector is to have all the powers of a constable under the Act, or otherwise. He may enter any place wherein he has reasonable ground for supposing (*a*) that disease exists or has within fifty-six days existed; (*b*) that the carcass of a diseased or suspected animal is, or has been, disposed of; (*c*) that there is to be found anything in respect of which there has been failure to comply with the Act or an order of the Board or a Local Authority; (*d*) that the Act or an order of the Board or a Local Authority is not complied with. He may enter any pen, vehicle, vessel, etc., in respect of which he has reasonable grounds for supposing that the Act or such order has not been complied with; but if required by the owner, he must state his reasons in writing. A certificate of a veterinary inspector that an animal is affected with a specified disease is conclusive evidence of the fact. An inspector of the Board is to have all the powers of an inspector throughout Scotland, or that part thereof for which he is appointed, and may enter any shed, land, or place for the purpose of ascertaining whether pleuro, foot-and-mouth disease, or swine fever exists, or has within fifty-six days existed (ss. 44, 63). A vessel in port may be detained on a representation by an inspector of the Board that the Act or an order of the Board or Local Authority is not complied with; and the officer detaining the vessel must deliver a copy of the representation to the person in charge thereof. To such a case s. 692 of the Merchant Shipping Act, 1894,[1] is to apply (s. 45).

SUBSECTION (16).—*General Provisions.*

891. The expenses of burial or destruction under direction of a receiver of wreck, of a carcass washed ashore, are expenses of the Local Authority, and may be recovered from them with costs by the receiver. Where such carcass was washed ashore from a vessel, the Local Authority may recover said expenses from the owner of the vessel, in the same way as salvage is recoverable (s. 46). All orders or documents made in pursuance of the Act are exempt from stamp duty and fees (s. 47). No proof of appointments or handwriting of officers under the Act is to be required. Notices in pursuance of the Act must be in writing, and may be served personally or by post; occupiers of lands to be served may be so described, without name, unless service is by post (s. 48). The Board may alter or revoke orders, and every order is to have effect

[1] 57 & 58 Vict. c. 60.

as if it had been enacted by the Act; notice thereof is to be given in the *London Gazette*, and published by the Local Authority as the Board may direct. Defect of publication is not to affect the validity of any such order (s. 49).[1] The Board are to make annual returns to Parliament (s. 50).

SUBSECTION (17).—*Offences and Legal Proceedings.*

892. A person guilty of an offence against the Act is liable (i) to a fine of £20; (ii) if the offence relate to more than four animals, £5 for each animal; (iii) if it relate to carcasses, fodder, litter, dung, etc., a fine of £10 for each half-ton after the first half-ton, in addition to the first fine of £20 (s. 51). The following are offences (proof of lawful authority or excuse resting on the accused): (i) contravention of the Act, or order of the Board, or regulation of Local Authority;[2] (ii) failure to isolate an animal, or give notice of disease; (iii) failure to do anything required by the Act, or order of Board or Local Authority; (iv) doing anything declared unlawful by Act or Board; (v) doing or omitting anything declared by Act or Board an offence; (vi) refusing to admit to lands, etc., or obstructing an officer; (vii) throwing carcasses of diseased or suspected animals into a river, etc., or into the sea within three miles from shore. A second or subsequent offence within twelve months of the first may be punished by one month's imprisonment (s. 52). A railway company accepting animals for transport over the line of another company has been held liable for causing the animals to be sent.[3]

893. The following offences are punishable by two months' imprisonment in lieu of fine:—(i) To do anything which requires a licence without one, with intent to evade the Act; (ii) with like intent to do a licensed thing after expiry of licence; (iii) to use an incomplete or untrue licence, unless in reasonable ignorance; (iv) with like intent, to alter, counterfeit, or use any instrument; (v) (vi) to attempt to obtain a licence, etc., by making a false declaration or pretence, unless in reasonable ignorance; (vii) to grant an instrument, materially false or without lawful authority, unless in reasonable ignorance; (viii) to issue, with like intent, a licence, etc., in blank; (ix) to use such a licence, unless in reasonable ignorance; (x) to obtain compensation by fraud; (xi) to dig up a buried carcass without authority or excuse, proof whereof lies upon accused; (xii) to use a vessel, vehicle, etc., for carrying animals, where prohibited by Board, without authority or excuse (s. 53).

894. Offences may be prosecuted and fines recovered summarily; but this does not apply to proceedings under the Customs Acts. The

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[1] *Chartered Institute of Patent Agents* v. *Lockwood*, 63 L.J., P.C. 74; *Baker* v. *Williams*, 66 L.J., Q.B. 880; see also *Huggins* v. *Ward*, 1873, L.R., 8 Q.B. 521.

[2] *Dunlop* v. *Weir*, 1888, 16 R. (J.C.) 14; *Roberts* v. *Burgh of Inverness*, 1889, 17 R. (J.C.) 19; *Sharp* v. *Leith*, 1892, 20 R. (J.C.) 12; *Howman* v. *Angus*, 1897, 2 Adam, 369; *Howman* v. *Orkney Steam Navigation Co.*, 1899, 2 Adam, 681.

[3] *Midland Rly. Co.* v. *Freeman*, 1884, 53 L.J., M.C. 79.

order of a Local Authority may be enforced by warrant of the Sheriff, at the instance of a procurator-fiscal (ss. 54, 64). Persons landing or shipping animals contrary to the Act are liable to the penalties under the Customs Act, as well as the present Act; and the animal or thing is to be forfeited (s. 56). An accused person may tender himself and be examined as a witness. Offences are to be deemed to have been committed either in the place of occurrence or where the accused is when proceedings are taken. The Court may direct half of any fine to be paid to the person proceeding for the same, otherwise fines are to be paid (*a*) in the Sheriff Court, to the King's Remembrancer; (*b*) in the J.P. Court, to the county collector; (*c*) in the Burgh Court, to the burgh treasurer; (*d*) in the Police Court, to the police commissioners' treasurer (ss. 57, 64).

SUBSECTION (18).—*Definitions, etc.*

895. "Cattle" means bulls, cows, oxen, heifers, and calves. "Animals" means cattle, sheep, goats, all other ruminating animals, and swine. "Disease" means cattle plague (*i.e.* rinderpest), contagious pleuro-pneumonia, foot-and-mouth disease, sheep-pox, sheep scab, or swine fever (*i.e.* typhoid fever of swine, soldier purples, red disease, hog cholera, or swine plague). "Carcass" includes meat, bones, hide, etc. "Inspector" means an inspector appointed by the Privy Council, Board of Agriculture, or a Local Authority. "Veterinary Inspector" means one who is a member of the Royal College of Veterinary Surgeons, or qualified as approved by the Board, or who holds the veterinary certificate of the Highland and Agricultural Society of Scotland (ss. 59, 63). All deeds granted by a Local Authority in Scotland must, in addition to being sealed, be signed by two members of the Local Authority and the clerk (s. 60). The prior Contagious Diseases Acts are repealed, except the clauses dealing with the regulation of Dairies and Milk-shops (s. 78).

ANIMALS, LIABILITY FOR DANGEROUS.

See NEGLIGENCE.

ANN.

See CHURCH.

ANNEXATION.

See CHURCH; CROWN; TEINDS.

ANNUALRENT.

See BURDENS; GROUND ANNUAL; HERITABLE SECURITIES; INTEREST OF MONEY.

ANNUITIES.

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Section 1.—Nature and Duration.

896. The right to an annuity may be defined as a right to a periodical payment of money, which amounts to a fixed sum in each year. The magnitude of the annuity depends upon the sum payable in each year; but payment need not be yearly. Periodical payments may be made at any interval that may be chosen, and accordingly there may be quarterly, monthly, weekly, or daily annuities.[1] As a general rule, however, in Scotland, annuities are payable twice in the year—at Whitsunday and Martinmas. Annuities may be granted either for a fixed term of years—when they are known as annuities certain—or for an uncertain duration of time. Annuities of the latter class generally depend for their duration on the issue of human life, and, when that is so, are known as annuities on lives. Annuities may further be distinguished as immediate or deferred, according as payment commences from the date of the grant or from a more distant period.

897. According to the terms of the contract, testament, disposition, or other instrument, in which it is reserved or created, an annuity may exist during the life of the granter, or of the grantee, or of any third party; or during the joint continuance of any number of lives; or during the longest of any number of lives; and it may be payable to one or more persons. Where the grant is to members of a class, the share of any member may on his death accresce to the survivors, or may lapse, or may pass to his representatives; the result in each case must be ascertained by ordinary methods of construction; there is no presumption that the gift of an annuity, with no duration expressed, means a gift for life only, at least where the gift is testamentary.[2]

898. According to Bell,[3] the rule of law upon which an annuitant is

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[1] *Smith* v. *Burns*, 1847, 9 D. 1344.

[2] *Fleming* v. *Reuther's Exrs.*, 1921 S.C. 593; *Mackenzie* v. *Dickson*, 1840, 2 D. 833.

[3] Bell, Com., 7th ed., i. 355.

entitled to bring his action, or to do diligence, is as follows : He may claim a capital sum corresponding to the annuity ; that is to say, such a capital as would, if invested, produce an annual return equal to the annuity to which he is entitled. The interest thereon is to be paid to him in terms of his ground of debt. At the termination of the period for which the annuity is to last, the capital will go back to the debtor. In a recent case the debtor was given the option of paying a lump sum equal to the purchase price of the annuity.[1] The rule in bankruptcy used to be the same, but questions of bankruptcy are now regulated by various sections of the Bankruptcy Act of 1913.[2]

Section 2.—Bonds of Annuity.

899. The instrument in which an annuity is usually set forth is called a Bond of Annuity, and forms of it may be found in the style books.[3] This is defined as a contract in which the obligor engages to make to the obligee a certain yearly payment in consideration of a price deemed adequate at the time of granting it, or in the intention of settling on the annuitant a yearly sum for family purposes, or from favour, as a permanent aliment.[4] When a price is paid, the sum should be set forth, in order to comply with the Stamp Acts. The obligant binds himself and his heirs, in the usual form, to pay, for the period agreed upon, at such terms as may be arranged, with penalty and interest in the event of due payment not being made. The bond should set forth whether the termly payments are to be in advance or at the end of each termly period. A widow's annuity is payable in advance *ex lege*,[5] and should be declared payable in advance. Until the passing of the Apportionment Acts, if an annuitant died between two terms nothing was due for the current term,[6] but now the matter is regulated by the Act of 1870,[7] which provides that all rents, annuities, dividends, and other periodical payments in the nature of income, shall be considered as accruing *de die in diem*, and be apportionable accordingly, unless there be special stipulation to the contrary.

Section 3.—Secured Annuities.

900. Annuities may be secured over heritable property, and this may be done by absolute disposition qualified by back letter, by a disposition in security ancillary to the bond of annuity, or by making the annuity a

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[1] See the opinion of Lord Dundas (and interlocutor of the Second Division in conformity therewith) in *Buchanan* v. *Eaton*, 1911, 1 S.L.T. 422, at 429, 430. The interlocutor of the Second Division was reversed on another ground by the House of Lords, 1911 S.C. (H.L.) 40.

[2] 9 Edw. VII. c. 49.

[3] Scots Style Book, vol. i. 282 *et seqq.* ; Juridical Styles, vol. ii. 326 *et seqq.*

[4] Bell, Com., 7th ed., i. 353.

[5] Ersk. Inst. i. 6, 41, ii. 9, 67.

[6] *Colebrooke* v. *Gibson Craig*, 1835, 13 S. 756.

[7] 33 & 34 Vict. c. 35. See *Fordyce* v. *Bridges*, 1847, 6 B. App. 1.

real burden by reservation.[1] It is to be kept in view that a real burden must be for a sum certain. In marriage contracts the security for the wife's jointure is usually granted in the form of a disposition in security of such a portion of the husband's lands, if he is a fee-simple proprietor, as will fully cover the annuity; or the disposition may be not of the lands, but of an annuity payable out of the lands.

901. The heir of entail in possession of an entailed estate may exercise any power contained in the deed of entail, or, under the Aberdeen Act as amended,[2] he may infeft his wife in an annuity not exceeding one-third of the free rents of the estate, after deducting public burdens and other deductions mentioned in the Act, but not income tax,[3] or the expenses of upkeep and management.[4] Such an annuity is in its nature alimentary and payable in advance.[5] An heir-female can similarly infeft her husband in an annuity not exceeding one-half of the rents. A bankrupt heir cannot exercise the power without the consent of his trustee.[6] An heir possessing under an entail which contains a clause of devolution may grant provisions which shall be valid although before his death he be obliged to denude,[7] and a *curator bonis* has been given special powers to grant provisions on behalf of his ward.[8] A wife who divorces her husband, does not receive her Aberdeen Act provision until his death.[9] Not more than two annuities granted over an estate under this Act can coexist. The Act as amended is applicable to all trusts under which land is held for the purpose of being entailed or under which money or other property is held for the purpose of purchasing land to be entailed, and, further, an heir-apparent, with consent of the heir in possession, can grant provisions to his wife, and these also may be provided out of entailed money.[10] In the event of a sale such provisions may be secured over the fund into which an entailed estate may be converted.[11]

Section 4.—Unsecured Annuities.

902. In the case of an annuity granted by a husband who is not in a position to give security, or who does not give it, the annuity, subject to the rules which govern marriage-contract provisions, as they are ante-nuptial or post-nuptial, is a debt due by his estate to the wife, contingent on her surviving him, and postponed till his death, for which

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[1] See *Buchanan* v. *Eaton*, 1911 S.C. (H.L.) 40, and cases there referred to.
[2] 5 Geo. IV. c. 87; 31 & 32 Vict. c. 84, s. 8.
[3] *Maclaine* v. *Maclaine*, 1845, 8 D. 150.
[4] *Earl of Galloway* v. *Dowager Countess of Galloway*, 1903, 6 F. (H.L.) 1.
[5] *Lamont Campbell* v. *Carter Campbell*, 1895, 22 R. 260; *Paul* v. *Anstruther*, 1864, 2 M. (H.L.) 1.
[6] *Somervell's Tr.* v. *Somervell*, 1909 S.C. 1125.
[7] *Hunter Blair* v. *Hunter Blair*, 1899, 1 F. 437; *Earl of Kinnoul's Trs.* v. *Drummond*, 1869, 7 M. 576.
[8] *Gordon's Curator bonis*, 1902, 4 F. 577.
[9] *Somervell's Tr.* v. *Dawes*, 1903, 5 F. 1065.
[10] 31 & 32 Vict. c. 84, ss. 6, 8.
[11] 45 & 46 Vict. c. 53, s. 24.

she will be entitled to rank with his creditors in the event of his bankruptcy.[1] An aliment granted to a wife did not fall under the *jus mariti*, so as to be affectable by her husband's creditors, or to be liable to compensation for debts due by him ; but in order to this the fund must have been alimentary, and it is not sufficient to make it alimentary that it be the sole fund of subsistence.[2] It has been held where, by antenuptial contract of marriage, an annuity was granted to the wife, and declared to be alimentary, but was allowed by her to fall into arrear, that she was not entitled to rank for the arrears, the existence of alimentary debts not being alleged.[3] This was during the husband's lifetime.

Section 5.—Legal Qualities of an Annuity.

903. Annuities being rights that bear a tract of future time are in their nature heritable,[4] but by the Titles to Land Consolidation Act of 1868, and the Conveyancing Act of 1874, heritable securities, including bonds of annuity, and real burdens were made moveable as regards succession of the creditor, unless executors are expressly excluded. They remain heritable *quoad fiscum*, are not to be computed in calculating the amount of a legitim fund, and are still heritable in questions between husband and wife.[5] Government funds are of the nature of an annuity, but they are personal by statute.[6]

904. Annuities being by nature heritable fall to be paid out of heritage, in the absence of an express provision to the contrary, provided there is sufficient heritage in the succession to satisfy the heritable debts.[7] They are primarily payable out of income. But if the income of an estate be insufficient to provide the annuities with which it is burdened, capital must be used ; and they are preferable to a gift of residue.[8] A direction to purchase an annuity gives rise to a charge upon capital. In the event of a deficiency of assets, an annuity bequeathed would suffer abatement along with other legacies.

Section 6.—Alimentary Annuities.

905. If an annuity be validly declared to be alimentary, it will not be capable of being attached, except for alimentary debts,[9] nor will

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[1] Bell, Com., 7th ed., i. 682. [2] *Ibid.*, 125.

[3] *Muirhead* v. *Miller*, 1877, 4 R. 1139 ; *Donald* v. *Donald*, 1860, 22 D. 1118.

[4] Bell, Prin., s. 1480 ; Com., 7th ed., ii. 4 ; Ersk. Inst. ii. 2, 6 ; Stair, Inst. ii. 1, 4 ; iii. 5, 6 ; *Reid* v. *M'Walter*, 1878, 5 R. 630 ; and see *Hill* v. *Hill*, 1872, 11 M. 247.

[5] 31 & 32 Vict. c. 101, ss. 3, 117 ; 37 & 38 Vict. c. 94, s. 30.

[6] Bell, Prin., s. 1342 ; Com., 7th ed., i. 101 ; *Hog* v. *Hog*, 1791 M. 5479.

[7] *Moon's Trs.* v. *Moon*, 1899, 2 F. 201 ; *Mackintosh* v. *Mackintosh's Trs.*, 1873, 11 M. (H.L.) 28 ; *Breadalbane's Trs.* v. *Jamieson*, 1873, 11 M. 912 ; *Crawford's Trs.* v. *Crawford*, 1867, 5 M. 275 ; *Wallace* v. *Ritchie's Trs.*, 1846, 8 D. 1038.

[8] *Colquhoun's Trs.* v. *Colquhoun*, 1922 S.C. 32 ; *Adamson's Trs.* v. *Adamson's Exrs.*, 1891, 18 R. 1133 ; *Kinmond's Trs.* v. *Kinmond*, 1873, 11 M. 381 ; *Knox's Trs.* v. *Knox*, 1869, 7 M. 873.

[9] *Lewis* v. *Anstruther*, 1852, 14 D. 857 ; 15 D. 263 ; *Harvey* v. *Calder*, 1840, 2 D. 1095 ; *Monypenny* v. *Earl of Buchan*, 1835, 13 S. 1112.

compensation be pleadable against the annuitant's claim for payment.[1] If it be unreasonably large, the Court will restrict it to a reasonable sum, and allow the balance to be affected by diligence.[2] But no one except a married woman in an antenuptial contract[3] can put his or her own property out of the reach of creditors and at the same time retain the beneficial use of it.[4] If not alimentary, the annuity may be assigned or renounced,[5] though a wife cannot, *stante matrimonio*, renounce an annuity provided under the marriage contract, if protected by a trust;[6] and arrears of an alimentary fund may be attached.[7] If an annuity be left to a person with power to burden it or dispose of it, he can claim its capitalised value, on the principle that the Court will not compel a man to do that which he can at once undo.[8] If, however, the annuity is alimentary, no such claim can be made.[9] An annuity cannot effectually be rendered alimentary except by means of a continuing trust.[10]

Section 7.—Diligence.

906. It is a general rule that it is incompetent to use diligence in security of a future debt, but in certain circumstances, as when the debtor in the annuity is *vergens ad inopiam* or is *in meditatione fugæ*, an annuitant may resort to arrestment, inhibition, or adjudication for the purpose of securing future payment of the annuity.[11] On the other hand, both arrestment and adjudication may be used against an annuitant.[12] An arrestment will only affect arrears, including the whole payment for the current term (legal or conventional, according to circumstances), if not already paid.[13] Where an annuity is adjudged, the debtor in the obligation for its payment has no title to plead, in answer to a demand for payment by the adjudger, that the adjudger's right has been extinguished by payment of the debt on which the adjudication proceeded.[14] Certain annuities, like teachers' annuities under the Education Acts, enjoy statutory protection from diligence.

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[1] *Thomson* v. *Thomson & Co.*, 1902, 4 F. 930; *Reid* v. *Bell*, 1884, 12 R. 178.

[2] *Livingstone* v. *Livingstone*, 1886, 14 R. 43.

[3] *Douglas Gardiner & Mill* v. *Mackintosh's Trs.*, 1916 S.C. 125 per Lord Salvesen, 127.

[4] Ersk. Inst. iii. 6, 7; Bell, Com., 7th ed., i. 124; *White's Trs.* v. *White*, 1877, 4 R. 786; *Reid* v. *Bell*, 1884, 12 R. 178; *Elliott* v. *Purdom*, 1895, 22 R. (H.L.) 26.

[5] *Christie's Factor* v. *Hardie*, 1899, 1 F. 703; *Standard Property Investment Co.* v. *Cowe*, 1877, 4 R. 695.

[6] *Ker's Trs.* v. *Ker*, 1895, 23 R. 317.

[7] Bell, Com., 7th ed., i. 127.

[8] *Dow* v. *Kilgour's Trs.*, 1877, 4 R. 403; *Kippen* v. *Kippen's Trs.*, 1871, 10 M. 134; *Tod* v. *Tod's Trs.*, 1871, 9 M. 728.

[9] *Branford's Trs.* v. *Powell*, 1924 S.C. 439; *White's Trs.* v. *White*, 1877, 4 R. 786; *Cosens* v. *Stevenson*, 1873, 11 M. 761; *Smith* v. *Campbell*, 1873, 11 M. 639; but see *Hutchinson's Trs.* v. *Young*, 1903, 6 F. 26.

[10] *Dempster's Trs.* v. *Dempster*, 1921 S.C. 332; *Brown's Trs.* v. *Thom*, 1916 S.C. 32; *Turner's Trs.* v. *Fernie*, 1908 S.C. 883; *Kennedy's Trs.* v. *Warren*, 1901, 3 F. 1087; *Murray* v. *Macfarlane's Trs.*, 1895, 22 R. 927; *Forbes' Trs.* v. *Tennant*, 1926, S.C. 264.

[11] Graham Stewart, Law of Diligence, pp. 15, 528, 665 and authorities there referred to; *Noble* v. *Noble*, 1921, 1 S.L.T. 57.

[12] Graham Stewart, Law of Diligence, pp. 52, 81, 600, 604 and authorities there referred to.

[13] *Smith* v. *Burns*, 1847, 9 D. 1344.

[14] *Macleod's Trs.* v. *Murray*, 1891, 18 R. 830.

Section 8.—Miscellaneous Decisions.

907. It has been decided that annuities do not fall under a clause conveying *acquirenda* to marriage-contract trustees,[1] nor do accumulations of such income when invested.[2] Where a capital sum has to be set aside to secure payment of an annuity, those in right of the reversion are not entitled to distribute the balance of the estate on purchasing an annuity.[3] The mere fact that payment of a legacy is postponed till the lapsing of an annuity does not suspend vesting of the legacy. The presumption in favour of vesting is even stronger than where the interposed interest is a liferent.[4] A trust will not be kept up merely for the purpose of securing annuities where the testator has not provided for this being done ;[5] but to purchase an annuity, and so set free a residue, is not an ordinary act of trust administration, and, accordingly, to do this has been held to require the consent of all the beneficiaries.[6] Where a residue was to be divided between an annuitant and other legatees, the annuitant was found entitled to a share of residue proportional to the capitalised value of her annuity.[7]

Section 9.—Life Assurance.

908. Under the Assurance Companies Act, 1909,[8] assurance companies dealing in life policies and annuities are bound to keep all receipts in respect of life assurance and annuity contracts separate, and the fund thus set aside is to be security for the life policy and annuity holders, and is not to be liable for any contracts but such as would be entered into in carrying on a life assurance business. Investigations have to be made periodically by an actuary. When a life assurance company is being wound up, all annuities must be valued according to the tables used by the company granting the annuity at the time of granting ; and where such tables cannot be ascertained or adopted to the satisfaction of the Court, then according to such rate of interest and table of mortality as the Court may direct.

Section 10.—Bankruptcy.

909. Special provision is made in the Bankruptcy Act of 1913[9] for fixing the value of an annuity. No creditor in respect of an

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[1] *Boyd's Trs.* v. *Boyd*, 1877, 4 R. 1002.
[2] *Dunbar's Trs.* v. *Dunbar*, 1905, 7 F. (H.L.) 92.
[3] *Wilson* v. *Beveridge*, 1833, 11 S. 343.
[4] *Henderson's Trs.* v. *Henderson*, 1876, 3 R. 320 ; *Alexander's Trs.* v. *Watson*, 1870, 8 M. 414 (418) ; and see *Coats' Trs.* v. *Coats*, 1903, 5 F. 401.
[5] *Kerr* v. *James*, 1858, 20 D. 562.
[6] *Parlane's Trs.* v. *Parlane*, 1902, 4 F. 805 ; *Graham's Trs.* v. *Graham's Trs.*, 1898, 1 F. 357.
[7] *Bryce's Tr.* v. *Hoffman*, 1878, 5 R. 722.
[8] 9 Edw. VII. c. 49.
[9] 3 & 4 Geo. V. c. 20.

annuity granted by the bankrupt shall be entitled to vote and draw a dividend until the annuity shall be valued; but he may, if the trustee has not been elected, apply to the sheriff, or, if the trustee has been elected, to the trustee, to put a value upon such annuity.[1] The value of the annuity is, in the ordinary case, its market price, as estimated either by the Government tables, or by any of the recognised life assurance tables.[2] The sheriff or trustee, as the case may be, is directed to put a value upon the annuity, regard being had to the original price given, deducting therefrom such diminution in its value as has been caused by the lapse of time since the grant thereof to the date of sequestration. In the case of an annuity certain, this is a mere matter of discounting interest. The creditor is entitled to vote and draw dividends in respect of such value, and no more. Notice of the application has to be given to the bankrupt and to the petitioning or concurring creditor in those cases where the application is to the sheriff. The judgment valuing the annuity is subject to review; and any creditor may appeal, or appear in any appeal.[3] Pending an appeal, the creditor may vote.[4]

910. It is a question whether the successor of an annuitant who dies during the sequestration, before the annuity has been actually valued, is entitled to vote and rank for the estimated value. Future aliment decerned for in an action of separation and aliment is not an annuity in the sense of this section of the Act.[5] It is also provided that the creditor in an annuity is not to sue or charge any cautioner for the annuity after the date of the sequestration, except for the value fixed in the manner above set forth, and arrears and interest. On the cautioner making payment of such value and arrears and interest, he is to be discharged of all liability for the annuity, and he may thereupon enter a claim in the sequestration for the sum so paid, and vote and draw dividends thereon. But until he makes such payment he is to be liable for the various payments of the annuity as they shall become due. In making the payment of the value, arrears, and interest, he is entitled to deduct such dividends as the creditor shall have received before full payment as aforesaid.[6] Where several persons are bound for an annuity, it may be inferred, perhaps, on the general principle that the creditor will not be entitled to enter into a compromise for valuing the claim against the principal debtor without the consent of the cautioner.[7]

Section 11.—Stamp Duty.

911. Under the Stamp Act of 1891,[8] the initial grant of an annuity is treated as a conveyance on sale, and the amount of the duty is calculable *ad valorem* upon the amount of the price. Where, upon the sale of any annuity not before in existence, such annuity is not created by

[1] Sec. 50.
[2] *Fergusson* v. *Smith*, 1836, 15 S. 25.
[3] Act, s. 50.
[4] *Watson* v. *Morrison*, 1848, 10 D. 1414.
[5] *Matthew* v. *Matthew's Tr.*, (O.H.) 1907, 15 S.L.T. 326.
[6] Act, s. 51.
[7] Bell, Com., 7th ed., i. 378.
[8] 54 & 55 Vict. c. 39.

actual grant or conveyance but is only secured by bond, warrant of attorney, covenant, contract, or otherwise, the bond or other instrument or some one of such instruments is to be charged with the same duty as an actual grant or conveyance.[1] But this rule will only apply if the transaction whereby the annuity is brought into existence is in substance one of purchase and sale.[2]

912. The Act also makes provision for those cases where the annuity, instead of being the thing sold, is the consideration for a conveyance on sale of other property. When the consideration consists of money payable periodically for a definite period not exceeding twenty years, the duty is to be charged on the total amount so payable. In other cases the consideration is held to be either twelve or twenty years' purchase of the annuity, according as the duration of the payment is or is not dependent upon life.[3]

913. A bond or other instrument which is the security for any annuity (except upon the creation thereof by way of sale) is liable to an *ad valorem* duty on the total amount of the payments, when this can be ascertained in advance, or to an *ad valorem* duty on the amount of the annual payment, when the duration of the payments is indefinite.[4]

Section 12.—Income Tax and Super Tax.

914. Income-tax law has been consolidated in the Act of 1918.[5] An annuity payable in the United Kingdom out of any public revenue, imperial, colonial, or foreign, is chargeable under Schedule C. The assessment is made by commissioners appointed for the purpose, and the tax is deducted and paid by the person paying the annuity. An annuity payable in respect of any public office or employment of profit is chargeable under Schedule E, but an annuity payable to a former holder of such an office does not fall within the terms of the schedule.[6] Under Schedule A the owner of lands which are subject to the payment of an annuity is not entitled to deduct the amount of the annuity in calculating the annual value of the lands, but is entitled to recoup himself, when paying the annuity, by deducting the proportion of tax applicable thereto. All annuities not charged under any of the other schedules, and not specially exempted from tax, are charged under Schedule D.

915. Every person paying an annuity is, according to circumstances, bound or entitled to deduct the income tax before payment. In those cases where he is paying out of funds which have not been brought into charge for tax, it is his duty to make the deduction and account therefor to the Commissioners.[7] If he fails to do so he will be liable for the amount which he should have deducted.[8] In those other cases where he is

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[1] Act, s. 60.
[2] *Cormack's Trs.* v. *Inland Revenue*, 1924 S.C. 819.
[3] Act, s. 56.
[4] Act, Schedule I.
[5] 8 & 9 Geo. V. c. 40.
[6] *Duncan's Trs.* v. *Inland Revenue*, 1909 S.C. 1212.
[7] Rule 21 of General Rules.
[8] *Lord Advocate* v. *Magistrates of Edinburgh*, 1905, 7 F. 972.

paying out of funds which have been brought into charge, it is his privilege to retain the amount deducted.[1] The question whether he may retain it is a matter between him and the Crown, with which the annuitant has nothing to do.[2] If he fails to make a deduction which he is entitled to make, he will not always be found entitled subsequently to recover it.[3] A contract to pay an annuity free of income tax is void under the Act.[4] But this does not apply to a bequest.[5] When an annuity is bequeathed free of income tax, that is just increasing the amount of the annuity. In a case regarding a widow's annuity provided free of income tax under an antenuptial contract of marriage, the validity of the provision was not challenged and it was decided that in this connection income tax includes super tax.[6]

916. Under the Act persons who have made insurances or contracted for deferred annuities on their own or their wives' lives are entitled, subject to limitations, to deduct the annual premium when returning their income for assessment, or if they have already paid tax, are entitled to a repayment of tax on the amount thereof.[7]

Section 13.—Death Duties.

917. For the purpose of estate duty,[8] property passing on the death of a deceased person is deemed to include any annuity or other interest purchased or provided by the deceased . . . to the extent of the beneficial interest accruing or arising, by survivorship or otherwise, on the death of the deceased.[9] The duty in respect of such an annuity may be paid in four yearly instalments.[10] Property passing on death is also deemed to include property in which the deceased or any other person had an interest ceasing on the death of the deceased to the extent to which a benefit accrues or arises by the cesser of such interest.[11] But estate duty is not payable in respect of the determination of an annuity for lives where the annuity was granted for full consideration, in money or money's worth, paid to the vendor or granter for his own use and benefit.[12] When partial consideration was so given, the value of the consideration is allowed as a deduction.[13] The value of the benefit accruing or arising from the cesser of an interest ceasing on the death of the deceased shall,

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[1] Rule 19 of General Rules; *Lord Advocate* v. *Edinburgh Life Assurance Co.*, 1910 S.C. (H.L.) 13.

[2] *Dalrymple* v. *Dalrymple*, 1902, 4 F. 545.

[3] *Galashiels Provident Building Society* v. *Newlands*, 1893, 20 R. 821; *Agnew* v. *Ferguson*, 1903, 5 F. 879.

[4] Rule 23 of General Rules.

[5] *Kinloch's Trs.* v. *Kinloch*, 1880, 7 R. 596; *Mackie's Trs.* v. *Mackie*, 1875, 2 R. 312; but see *Rodger's Trs.* v. *Rodger*, 1875, 2 R. 294.

[6] *Wordie's Trs.* v. *Wordie*, 1922 S.C. 28. See also *Smith's Trs.* v. *Smith*, 1924 S.C. 485.

[7] Act, s. 32.

[8] 57 & 58 Vict. c. 30.

[9] Sec. 2 (1) (*d*).

[10] 59 & 60 Vict. c. 28, s. 16.

[11] 57 & 58 Vict. c. 30, s. 2 (1) (*b*); *Lord Advocate* v. *Maclachlan*, 1899, 1 F. 917; *Lord Advocate* v. *Henderson's Trs.*, 1905, 7 F. 963; *Lord Advocate* v. *Earl of Moray*, 1917, 1 S.L.T. 168.

[12] Sec. 3 (1); *Lord Advocate* v. *Lyell*, 1918 S.C. 125.

[13] Sec. 3 (2).

if the interest extended to the whole income of the property, be the principal value of that property ; [1] and, if the interest extended to less than the whole income of the property, be the principal value of an addition to the property equal to the income to which the interest extended.[2] Estate duty is not to be payable in respect of a single annuity not exceeding £25 purchased or provided by the deceased either by himself or in concert with any other person, nor in respect of any pension or annuity payable by the Government of British India.[3] Annuities may also be chargeable with succession duty [4] and legacy duty.[5]

Section 14.—Government Annuities.

918. Annuities may be purchased from Government either direct or through savings banks. The conditions under which these annuities are issued and the arrangements for purchase and payment are contained in the Government Annuities Acts, 1829 to 1882.[6]

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[1] Sec. 7 (7) (*a*).
[2] Sec. 7 (7) (*b*); and cases of *Maclachlan, Henderson's Trs.*, and *Earl of Moray* (*ut supra*).
[3] Sec. 15.
[4] *Lord Advocate* v. *Sidgwick*, 1877, 4 R. 815 ; *Urquhart's Trs.* v. *Gordon*, 1900, 3 F. 242.
[5] *Lord Advocate* v. *Reid's Exrs.*, 1880, 7 R. 483.
[6] 10 Geo. IV. c. 24 ; 2 & 3 Will. IV. c. 59 ; 16 & 17 Vict. c. 45 ; 27 & 28 Vict. c. 43 ; 36 & 37 Vict. c. 44 ; and 45 & 46 Vict. c. 51.

ANNUITY OF TEINDS.

See TEINDS.

ANNUS DELIBERANDI.

See APPARENT HEIR.

ANON DOMINO.

ANON HABENTE POTESTATEM.

See PRESCRIPTION.

ANTENUPTIAL CONTRACT OF MARRIAGE.

See MARRIAGE CONTRACT.

ANTENUPTIAL DEBTS.

See HUSBAND AND WIFE.

APOCHA-TRIUM ANNORUM.

See DISCHARGE; PRESUMPTION.

APOLOGY.

See DEFAMATION.

APOTHECARIES.

See MEDICINE AND PHARMACY.

APPARENT HEIR.

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Section 1.—Meaning of the Term.

919. If it be not expressly abolished, apparency has now little practical importance, and in the following sections no more is attempted than such a sketch of the law of apparency as will enable a present-day practitioner to follow the numerous decisions which were pronounced when the apparent heir had a real existence.

920. "Apparent heir" is a technical term; it is not equivalent to apparent heir or heir-apparent in the popular [1] sense or in the sense of the Entail Acts.[2] In the popular sense and in the Entail Acts the term is used to denote someone alive in the ancestor's lifetime. In the technical sense the apparent heir was truly an heir for he had survived his ancestor. "Heir," moreover, in this connection was used in its strict sense, for apparency had no place in moveable succession.[3] Technically, then, the apparent heir was "he who [was] entitled to enter heir to a deceased ancestor . . . before his actual entry." [4] "An apparent heir [was] the person who, after the succession [had] opened, [was] entitled to take it up as heir at law, but who [had] not yet made up his titles." [5] Stair [6] speaks of apparent heirs as "heirs not entered." [7]

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[1] Ersk. Inst. iii. 8, 54.
[2] See, *e.g.*, the Rutherfurd Act (11 & 12 Vict. c. 36), s. 52.
[3] Bell, Com. (M'Laren's ed.) vol. i. p. 703.
[4] Ersk. Inst. iii. 8, 54.
[5] Bell, Prin. s. 1677.
[6] III. v. 4.
[7] See also Bell, Com. (M'Laren's ed.) vol. i. p. 94.

Section 2.—Rights and Privileges of Apparent Heir.

Subsection (1).—*Liability of Heir.*

921. To-day it appears natural and obvious, more especially in the case of heritage which is identifiable by its title, that an heir on succeeding to his ancestor's heritage should be liable for his debts only in so far as he has profited by the succession. But until the last century that was not in accordance with Scots law. Our law presumed that the ancestor's heritable estate was fully adequate to the payment of any debts, and, as a result, "his heir, taking up the universal right and character of heir, [was] held, in assuming the benefit, to undertake also the burden, and to become liable for every debt of the proprietor deceased." [1] A wealthy heir who took up an insolvent ancestor's heritage found his means and estate not derived from his ancestor liable to his ancestor's creditors. He became personally liable to the extent of his own as well as his ancestor's assets. His passive liability was universal.

922. This presumption necessarily produced certain results. Automatic completion of the heir's right by the death of the ancestor was out of the question, for that would have involved automatic creation of personal liability. The heir must have a chance to renounce or to accept the succession. To enable the heir to exercise his option intelligently, it was necessary that he should have an opportunity to satisfy himself whether the succession could be safely accepted or not. In most cases that would involve investigation, and that again would take time. In the meantime the ancestor's creditors must be prevented from doing diligence against the estate and acquiring preferences or compelling an uninformed heir to exercise his option one way or another.

These considerations received effect in certain privileges [2] which belonged to the apparent heir.

Subsection (2).—*The Jus Deliberandi.*

923. This was the privilege of deliberating whether the succession would be profitable or not.[2] Apparently in the earliest times creditors could attach the lands of their deceased debtor without giving any previous charge to the heir to enter.[3] Later, creditors of the ancestor were empowered to charge an heir of full age to enter, year and day being passed after the death of his ancestor.[4] This was afterwards extended to creditors of the heir.[5] "Year and day to deliberate" are the words of the Act 1695, c. 24. This period was afterwards reduced to six months.[6] The period ran in the usual case from the date of the

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[1] Bell, Com. (M'Laren's ed.) vol. i. p. 702. [2] Ersk. Inst. iii. 8, 54; Stair, iii. 5, 1.
[3] Ersk. Inst. ii. 12, 11. [4] Act 1540, c. 106. [5] Act 1621, c. 27.
[6] 31 & 32 Vict. c. 101, s. 61, re-enacting 21 & 22 Vict. c. 76, s. 27, and 23 and 24 Vict. c. 143, s. 16.

ancestor's death. During that period the ancestor's creditors could not force the heir to exercise his option one way or another. They could charge him to enter within the period, but the charge could not be proceeded upon until the period had expired. During the period no action against the heir was competent if he was unable to plead the proper defences without founding on the ancestor's right. If he had founded on his ancestor's right, he would have impliedly taken up the succession and incurred a passive title. If such an action had been allowed to proceed, the heir would either have had to allow decree to pass in absence or to have taken up the succession. That was in effect to deprive him of the right of deliberation. An action might, however, be begun within the period, provided it was not called in Court before the expiration of the period.[1] The objection that diligence was being used by a creditor within the period was not personal to the heir; if he did not plead it other creditors than the pursuer could do so, for otherwise preferences among creditors might be created.[2]

Subsection (3).—*Action of Exhibition ad deliberandum.*

924. To enable the heir to decide whether to take up the succession or not, he required to obtain such a knowledge of his ancestor's assets and liabilities as would enable him to determine whether the succession would be lucrative or not. For that purpose he could bring the action of exhibition *ad deliberandum*. The object was to obtain exhibition of all writings bearing on the value of the succession. The action was merely for exhibition for the purpose of inspection. The heir could neither insist on delivery of writings in favour of his ancestor [3] nor compel payment in terms of the writings exhibited.[4] Writings in favour of the ancestor and those granted by him to members of his family [5] or to strangers [6] could be recovered notwithstanding that the deed had been recorded.[7] Exhibition of an irredeemable disposition or entail by which the ancestor had divested himself of a special subject could not be obtained because such a deed of itself necessarily involved that the subject in question formed no part of the succession.[8] Exhibition of a redeemable disposition, if the right under it had not been rendered absolute by declarator of the expiry of the legal, could be obtained.

925. The action was competent not only to the heir of line but also to any other heir who might be charged to enter.[9] An heir who had incurred the passive title of *gestio pro herede* and had lost the right of deliberating was nevertheless entitled to bring an action for exhibition against a stranger, because the plea of passive titles was open only

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[1] Ersk. Inst. iii. 8, 54.
[2] *Summers* v. *Simson and Gardner*, 1757, M. 6882.
[3] *Nisbet* v. *Whitelaw*, 1626, M. 3982.
[4] *Leslies* v. *Jaffray*, 1671, M. 3998.
[5] *Tailzifer* v. *Forrester and Sornbeg*, 1661, M. 4006.
[6] *Spark* v. *Barclay*, 1715, M. 3988.
[7] *Ibid.*, 1715, M. 4019.
[8] *Yester* v. *Lauderdale*, 1683, M. 3999.
[9] *Lord Callendar* v. *Duke of Hamilton*, 1686, M. 3985.

to creditors. If the heir renounced the succession, he could not sue the creditor at whose instance he had been charged to enter, because the renunciation necessarily implied an admission of that creditor's right;[1] but the action was competent against other creditors, for their rights had not been impliedly admitted.[2]

Subsection (4).—*Vesting of Rights.*

926. The *jus deliberandi* and the action for exhibition were special privileges of the apparent heir, but he had other more general rights. Rights which did not require service vested in him at once —*e.g.* Titles of honour, udal lands in Orkney and Shetland,[3] and the now extinct[4] heirship-moveables.[5] Leases[6] and other heritable subjects which bore a tract of future time vested in him at once, because time continued to run on those temporary rights notwithstanding that the heir was not entered. The heir did not merely continue his ancestor's possession under a lease, but the right was actually transferred to him. He could grant a voluntary assignation[7] and a creditor of the ancestor who held a lease could adjudge it from the heir without charging him to enter[8] in special.

927. The apparent heir was entitled to continue his ancestor's possession.[9] He could enter into actual possession of the mansion-house, lands, etc., and might continue the civil possession. He could cut the wood on the estate.[10] He could defend tenants or others, who possessed upon titles derived from his ancestor, against third parties challenging their titles.[11] He could sue tenants for their rents. His right to remove tenants was at first doubted but was later approved, subject to the proviso that he must be infeft before calling of the action.[12] Possession upon apparency was available for the purposes of prescription, subject to certain conditions.[13]

928. The bare right of apparency entitled the heir to sue a life-renter of the lands for aliment.[14] He could sue a reduction *ex capite lecti*[15] and reduce deeds which, standing unreduced, precluded his service.[16] Theoretically, the position of the heir-apparent might be stated thus: he was the embodiment of the *hereditas jacens* which was subject to the claims of the ancestor's creditors, and he was entitled to act as such. The moment, however, he did any act as successor to his ancestor, not as representing the *hereditas jacens*, he was acting beyond his powers as apparent heir, and would have impliedly accepted the inheritance. In practice it can hardly be said that the theory was logically carried out,

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[1] *Richardson* v. *Livingstone*, 1721, M. 3989.
[2] *Waird* v. *Waird*, 1675, M. 3983.
[3] *Beatton* v. *Gaudie*, 1832, 10 S. 286.
[4] 31 & 32 Vict. c. 101, s. 160.
[5] Ersk. Inst. iii. 8, 77.
[6] *Boyd* v. *Sinclair*, 1671, M. 14375.
[7] *Campbell* v. *Cunningham*, 1739, M. 14375.
[8] *Rule* v. *Hume*, 1635, M. 14374.
[9] *M'Kie* v. *M'Kie*, 1741, M. 5239.
[10] Bell, Com. (M'Laren's ed.) vol. i. p. 95.
[11] *Lord Roslin* v. *Fairbairn*, 1627, M. 5233.
[12] See *Walker* v. *Hendry*, 1925, S.C. 855.
[13] Millar on Prescription, pp. 45 and 46.
[14] *Hepburn* v. *Seaton*, 1635, M. 381.
[15] Ersk. Inst. iii. 8, 100.
[16] *Rutherfurd* v. *Nisbet's Trs.*, 1830, 9 S. 3.

and the heir's position varied at different periods in the development of the law.

Section 3.—Termination of Apparency.

Subsection (1).—*By Service.*

929. Apparency was, of course, brought to an end by service. Whether the service was general or special (which always implied a general service), universal passive representation was incurred,[1] subject to this, that the different heirs of the ancestor must be discussed in their proper order.[2]

Subsection (2).—*Entry by Precept of Clare constat.*

930. This method of entry gave an active title to the special subject involved. Stair,[3] Erskine,[4] and Duff [5] all state that entry by this method involved universal passive representation. More recent authorities [6] hold that entry by this method did not involve passive representation. Erskine considered entry by hasp and staple had the same effect as entry by precept of *clare constat quoad* liability for debts.[7] The cases [8] relied upon by the later authorities do not appear to be free from specialties.

Subsection (3).—*Incurring Passive Title.*

931. Apparency was brought to an end by incurring a passive title —*e.g. gestio pro herede.* See Passive Titles.

Subsection (4).—*Adjudication upon Trust Bond.*

932. A tentative title might be made up by way of adjudication upon a trust bond. This device is attributed to Sir Thomas Hope. It enabled the heir to challenge adverse deeds, and originally did not involve passive responsibility. The heir granted a bond to a confidential person for more than the value of the estate. The holder of the bond then charged the heir to enter, and thereafter attached the estate by adjudication. Having done so he challenged the adverse deed. If the challenge was successful the bond-holder conveyed the bond and adjudication to the apparent heir in whom the debt was extinguished *confusione.* The heir thus acquired a good title to the land. The heir could redeem prior adjudications or set them aside on the ground of nullities or prove that they had been satisfied. But the use of such a

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[1] Ersk. iii. 8, 68; Bell, Prin. s. 1916.
[2] Ersk. Inst. iii. 8, 52.
[3] Stair, iii. 5, 26.
[4] Inst. iii. 8, 71.
[5] On Deeds, p. 486.
[6] See Ivory's Note to Ersk. Inst. iii. 8, 71; Bell, Conveyancing (3rd ed.), vol. ii. p. 1101; Menzies, Conveyancing (1900 ed.), p. 808; Bell, Prin. ss. 1823 and 1922.
[7] Inst. iii. 8, 72.
[8] *Farmer* v. *Elder,* 1683, M. 14003; *Blount* v. *Nicholson,* 1783, M. 9731.

conveyance subjected the heir to a passive title under the Act 1695, c. 24.[1] See Adjudication.

Subsection (5).—*By Proceedings at the Instance of Creditors.*

933. When the period of deliberation had expired the creditors of the ancestor could force the heir to enter or renounce the succession. Creditors of the heir could also take proceedings to compel the heir to make up a title so as to render the estate available to satisfy their debts. A general service was regarded as a general admission by an heir that he represented his ancestor. Now in the case of the ancestor's creditors it was necessary at the outset to fix whether the heir was to represent his ancestor or not. The first step, therefore, was to charge the heir in general to enter to his ancestor. If he did not obey, the creditor might bring an action of constitution against him. If he did not renounce the succession, decree of constitution went out against him, which rendered him personally liable for the debt.

934. To make the lands available, the creditor had to charge the heir to enter into them. If the ancestor had died infeft and the heir could have completed his title by special service, the creditor charged the heir to enter in special. If the ancestor's right was personal and the heir could only take it up by general service, the creditor served a general-special charge. When the days of either form of charge had expired the result was the same as if the heir had entered to the lands and the creditor could do diligence against them. The heir's creditors proceeded in a similar fashion, except that they did not require to give a general charge to enter. If the heir renounced the succession it was obvious that a special or special-general charge was out of the question, and to meet this case the Court introduced adjudication upon a decree *cognitionis causa*. The action was then really against the *hereditas jacens*, though the heir was formally called as defender, and it was described as *cognitionis causa* because the object of the action was to fix the amount of the debt that adjudication therefor might proceed against the lands. Having obtained decree the creditor proceeded by adjudication against the lands.

Section 4.—Development of the Law.

Subsection (1).—*Entry with Limited Liability.*

(i) *Beneficium Inventarii.*

935. The Act 1695, c. 24, introduced two expedients which enabled an heir to enter with limited responsibility. The first of these was the *Beneficium inventarii*. Any apparent heir was by the above-mentioned Act entitled to enter to his predecessors upon inventory as was done by

[1] Ersk. Inst. ii. 12, 34 and 49.

executors in the case of moveables. The heir still retained the right to deliberate (with its relative action) for the year and day. The inventory had to be made up within the year and day. It required to be upon oath and to state the ancestor's heritage fully and completely. It had to be given in, recorded, and extracted within the year and day. An extract of it had to be recorded within forty days of the expiry of the year and day. The Act, however, did not require the heir to enter within the year and day. An apparent heir who entered by inventory as above specified was declared to be liable for his predecessors' debts and deeds *secundum vires inventarii*, and in so far as the value of the heritage given up in the inventory would extend and no farther. If the apparent heir had intromitted with his ancestor's heritable estate or any part of it except as a necessary act by way of preservation and custody before giving in or recording the inventory, or if he fraudulently omitted any item from the inventory, he lost the benefit conferred and was universally liable. If the omission was not fraudulent, provision was made for giving in an eik to the inventory. A full exposition of the position of an heir who entered *cum beneficio inventarii* will be found in Bell's Commentaries.[1]

(ii) *Service of Heirs Act*, 1847.

936. This procedure was superseded by the Service of Heirs Act, 1847.[2] Sec. 23 of that Act enacted that a decree of special service should no longer be held to imply a general service in the same character (which it always did in the earlier law, and as a result entailed universal responsibility) except as to the particular lands and heritages embraced in the special service, and that every decree of special service should infer only a limited passive representation of the deceased, the limitation being the extent or value of the lands and other heritages embraced in the special service. The specification of the lands in the special service was thus treated as being itself the inventory. Sec. 25 of the same Act enabled a general service to be expede with a specification of the lands and heritages to which the heir desired its application to be limited. Entry by general service with such a specification inferred passive representation only to the extent or value of the lands and heritages set out in the specification. These provisions were repeated in the Titles to Land Consolidation (Scotland) Act, 1868.[3] It is to be observed that under those Acts, *i.e.* until the commencement of the Conveyancing (Scotland) Act, 1874, the heir, until he served, was still apparent heir and was still capable of incurring universal responsibility. When he served in special his responsibility was automatically limited; when he served in general he might, by taking the appropriate steps, limit his responsibility.

[1] Bell, Com. (M'Laren's ed.), vol. i. pp. 706–708.
[2] 10 & 11 Vict. c. 47.
[3] 31 and 32 Vict. c. 101, ss. 47 and 49.

(iii) *Ranking and Sale.*

937. The Statute of 1695, c. 24, introduced another expedient to enable the heir to avoid universal responsibility. It provided that if an apparent heir, without being lawfully served or entered heir, either entered to possess his predecessor's estate, or any part thereof, or should purchase by himself or any other on his behalf any right thereto, or to any legal diligence or other right affecting the same otherwise than on exposure of the estate to public roup and as the highest offerer thereat, without collusion, his possession or purchase should be reputed a behaviour as heir and a sufficient passive title to make him represent his ancestor universally as if he had lawfully served and entered. It was, however, declared that the apparent heir might bring the estate to a roup whether the estate was bankrupt or not. Although the Act does not say so, the sale referred to was not a private sale but was a sale under judicial authority.[1] It was a variant of the judicial sale available to creditors under the Act 1681, c. 17, and was carried out by way of action of ranking and sale. The initiation of such a process by an apparent heir did not infer a passive title.[2] It was available to an heir notwithstanding that he had behaved as heir,[3] and also to an heir who had served in general *cum beneficio inventarii*,[4] but it was not available to an heir entered and infeft *cum beneficio*.[5] It was unnecessary to prove insolvency, and apparency alone was a sufficient title to bring the action. It was in effect a process of competition whereby the heritable estate was made available to creditors. The heir was in effect acting as a trustee for creditors, and acted *primo loco* for their interests and for his own for any reversion there might be. If there was any surplus after the creditors were paid, warrant was granted to pay it to the heir although he declined to enter.[6] The decree of sale was held as an adjudication for all creditors,[7] and the action had effects by way of equalising diligence. Procedure by way of ranking and sale was very cumbrous, and has now been superseded in practice by the much simpler procedure authorised by the Bankruptcy statutes.

Subsection (2).—*Prevention of Fraud against Creditors.—Act*, 1695, c. 24.

938. This Act was passed to prevent the frauds of apparent heirs. An apparent heir was entitled to possess his ancestor's lands, and though creditors could proceed against the lands after the expiry of a

[1] Ersk. Inst. ii. 12, 61.
[2] Bell, Com. (M'Laren's ed.), vol. ii. p. 242.
[3] *Blair* v. *Stewart*, 1733, M. 5247.
[4] *Blair*, 1751, M. 5353.
[5] Bell, Com. (M'Laren's ed.), vol. ii. p. 241.
[6] *Hamilton*, 1750, M. 5297; *Middlemore* v. *Macfarlane*, 1803, M. App. *voce* Heir-Apparent, No. 2.
[7] Bell, Prin. s. 2337.

year and day, it did not follow that they invariably proceeded to do so. Thus an heir might possess upon apparency for years. People who dealt with him would make no scrupulous inquiry into his rights and would proceed on his ostensible means. If he died possessing an apparency the next heir might pass him over when he came to serve, with the result that the interponed heir's liabilities would not transmit against the next heir when he came to serve. The Act of 1695, c. 24, therefore provided that if any man after 1st January 1661 have served or shall serve himself heir or, by adjudication on his own bond, had succeeded or should succeed, not to his immediate predecessor but to one remoter, as passing by his father to his "goodsir" or the like, he should be liable for the debts and deeds of the person interjected to whom he was apparent heir and who was in possession of the lands and estate, to which he was served, for the space of three years and that in so far as might extend to the value of the said lands and estate and no farther, deducting the debts already paid.

939. This remedy was imperfect.[1] The person to whom the service might be expede need not be infeft but might be disponee under an unfeudalised disposition.[1] *De facto* possession by the interjected heir was sufficient to infer the liability.[2] Possession by one under the authority of the interjected heir was also sufficient, *e.g.* by a disponee of the apparent heir upon a disposition prior to the expiry of the three years.[3] The Act did not apply where the estate was in the possession of a judicial factor in a ranking and sale [4] or of trustees under an unfeudalised trust deed to pay off debts,[5] or where a liferenter was in actual possession and the interjected heir had the bare fee [6] unless the interjected heir had himself granted the liferent.[7] The debts and deeds must be onerous, *i.e.* in discharge of legal or natural obligations.[8] The next heir must make up a title by service, or adjudication on trust bond, or by precept of *clare constat.*[9] If he did not make up a title the Act did not apply.[10] The liability was limited and did not run with the lands but was personal to the next heir who had passed over the interjected heir.[11]

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[1] Bell, Com. (M'Laren's ed.), vol. i. p. 708.
[2] *Knox* v. *Irvine and Forsyth,* 1759, M. 5276.
[3] *Yule* v. *Ritchie,* 1758, M. 5299; *Fleming's Trs.* v. *Fleming's Tutors,* 1882, 9 R. 1013.
[4] *Buchan* v. *Macdonald,* 7th Dec. 1796, F.C.
[5] *Donald* v. *Colquhoun,* 1835, 13 S. 574.
[6] *Creditors of M'Caul* v. *M'Caul,* 1745, M. 9748.
[7] Bell, Com. (M'Laren's ed.), vol. i. p. 709.
[8] *Muirhead* v. *Muirhead,* 1724, M. 9807; *Countess Dowager of Glencairn* v. *Cunningham Graham,* 1800, M. App. *voce* Heir-Apparent, No. 1, 5 Pat. 134; *Carmichael* v. *Carmichael,* 15th Nov. 1810, F.C.; *Lindsay* v. *University of Glasgow,* 1794, Hume 429; *Russell* v. *Russell,* 1852, 15 D. 192; *Taylor* v. *Hutton,* 1854, 16 D. 885; *Fleming's Trs.* v. *Fleming's Tutors,* 1882, 9 R. 1013; *Kennedy* v. *Kennedy,* 1829, 7 S. 397; *Orr* v. *Orr's Trs.,* 1871, 9 M. 500; *Glen* v. *Scales' Trustees,* 1881, 9 R. 317.
[9] *Brown* v. *Henderson,* 1852, 14 D. 1041.
[10] *Grant* v. *Sutherland,* 1754, M. 9819, aff. 1 Pat. 605.
[11] *Sympson* v. *Hamilton,* 1707, M. 9807.

940. The Act of 1695 also rendered other devices of apparent heirs to defeat their creditors abortive. By the clause above quoted, if an apparent heir entered to possess his predecessor's estate or any part thereof, or purchased any right thereto or to any diligence affecting that estate except by public roup and without collusion, he incurred a passive title. Entry by adjudication upon trust bond was thus rendered a passive title. By a further clause of the same Act it was provided that where rights and legal diligences affecting the ancestor's estate were found settled in the person of any such near relation that the apparent heir to the ancestor might also succeed to that relation as his heir, the apparent heir possessing in virtue of such rights or diligences, except upon purchase at public roup, should incur a passive title and the right and diligences themselves should be sustained as valid in a competition with the ancestor's other creditors only in so far as they were shewn to be *bona fide* and onerous.

Subsection (3).—*Diligence by Creditors.*

941. In addition, the Act 1661, c. 24, enacted that creditors of the ancestor should be preferred to those of the heir, provided that they did diligence within three years (*i.e.* three calendar years[1]) after the ancestor's death. The diligence must be perfected.[2] A decree of sale at the instance of an apparent heir within a year and day of the first effectual adjudication was a diligence which enabled ancestor's creditors to claim the statutory preference,[3] but an inhibition used within the three years was held not to create a preference over creditors of the heir whose debts were contracted prior to its date.[4] Under the Bankruptcy (Scotland) Act, 1913,[5] the act and warrant of a trustee in a sequestration operates as a complete diligence in favour of the creditors of the ancestor.[6]

The same Act also provided that no right or disposition made by an apparent heir, in so far as it might be prejudicial to the ancestor's creditors, should be valid unless it was made and granted a full year after the ancestor's death.

942. The methods by which the creditors of the ancestor attached his estate after the expiration of the *tempus deliberandi* have been referred to above. The steps were (1) a general charge to enter; (2) an action of constitution; (3) a special or special-general charge; and (4) an action of adjudication; when the heir renounced the decree of constitution was taken *cognitionis causa*—*i.e.* against the *hæreditas jacens*, and as a charge against an heir who had renounced was incompetent, that was followed directly by a decree of adjudication *contra hereditatem jacentem*. By the Lands Transference Acts, 1847,[7] the citation in the action of

[1] *Paterson* v. *Bruce*, 1678, M. 3126.
[2] *Lord Ballenden* v. *Murray*, 1685, M. 3127.
[3] *Irvine* v. *Maxwell*, 1748, M. 5264.
[4] *Menzies* v. *Murdoch*, 1841, 4 D. 257.
[5] 3 & 4 Geo. V. c. 20, s. 97.
[6] See *Menzies* v. *Poutz*, 1916, S.C. 143.
[7] 10 & 11 Vict. c. 48, s. 16, and 10 & 11 Vict. c. 49, s. 8.

constitution was declared equivalent to the general charge, and the citation in the action of adjudication to the special or general-special charge. Later the decrees of constitution and adjudication were allowed to be concluded for in one action, and that whether the heir renounced the succession or not. The matter is now regulated by the Titles to Land Consolidation (Scotland) Act, 1868, ss. 60 and 61. It is still occasionally necessary to resort to this process of constitution and adjudication as a method of making up a title, and a very useful explanation of the development of the law upon this matter will be found in Bell's Lectures on Conveyancing.[1]

SUBSECTION (4).—*Effect of Conveyancing (Scotland) Act*, 1874.

943. The liability of an heir for his ancestor's debts now rests upon the Conveyancing (Scotland) Act, 1874. Sec. 9 provides: "A personal right to every estate in land descendible to heirs shall, without service or other procedure, vest or be held to have vested in the heir entitled to succeed thereto, by the survivance of the person to whom he is entitled to succeed, . . . and such personal right shall, subject to the provisions of this Act, be of the like nature and be attended with the like consequences and be transmissible in the same manner as a personal right to land under an unfeudalized conveyance, according to the existing law and practice." And s. 12 provides: "An heir shall not be liable for the debts of his ancestor beyond the value of the estate of such ancestor to which he succeeds, and if an heir shall renounce the succession, the creditors of the ancestor shall have the same rights against the estate as upon a renunciation according to the law before the commencement of this Act. When an heir has, before renunciation, intromitted with the ancestor's estate, he shall be liable for the ancestor's debts to the extent of such intromission, but no farther."

944. By these provisions possession upon apparency has been rendered impossible.[2] The heir-apparent holding upon apparency had no doubt a personal right to the lands in the sense that he could if he chose make his right to the lands real, but his right was very far from being the same as that of a disponee under an unfeudalised disposition. Seeing that such a right as the latter now vests immediately on survivance, there is now no room for the amorphous right possessed by an apparent heir.

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[1] 3rd ed., vol. ii. pp. 819–21.

[2] *M'Adam* v. *M'Adam*, 1879, 6 R. 1256, Lord President Inglis at p. 1258.

APPEAL (CIVIL).

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Section 1.—Introduction.

945. The right of appeal from the judgments of an inferior to a superior Court is inherent in every legal system. In Scots law civil jurisdiction is mainly vested in the Sheriff Court and the Court of Session, with the House of Lords as the ultimate Court of appeal. The following sections, therefore, deal mainly with appeals affecting these Courts. Appeals from the Outer House of the Court of Session, which exercises an original jurisdiction with which that of the Sheriff Court is to some extent concurrent, are known as Reclaiming Notes, and are elsewhere dealt with. (See Procedure.) An ancient, but now restricted,

jurisdiction has been exercised in Scotland by the Justice of the Peace Courts. For practical purposes the civil judicial work of these Courts is now confined to Small Debt cases up to £5 in value, and there is no appeal in such cases, the only remedy being an action of reduction on the ground of malice and oppression, which must be brought within a year. Appeals in Small Debt Cases in the Sheriff Court, while relegated to the Circuit Court or Court of Justiciary, are appeals in civil causes and are dealt with here. The question whether a case is civil or criminal in character as affecting appeals is discussed under the head of Appeal (Criminal), *q.v.*

946. Formerly the method by which cases from an inferior Court were brought before a superior Court, either for further procedure or that the judgment might be reviewed, was known as advocation ; but appeal was substituted for advocation by the Court of Session Act, 1868.[1]

947. The jurisdiction of the Sheriff Courts in civil matters is now mainly regulated by the Sheriff Courts (Scotland) Acts, 1907 and 1913. In addition, however, to their general jurisdiction, the Sheriff Courts in a very large number of cases exercise a special statutory jurisdiction, conferred on them by special Acts, and difficult questions sometimes arise as to whether the judgment of the Sheriff is final or not in such cases. So far as the Sheriff's decisions are given in the exercise of discretionary powers, appeal against these decisions will not be competent.[2] So far, however, as his decisions are judgments, the presumption is in favour of appeal. The general rule has been stated thus by Lord President Inglis in *Marr & Sons* v. *Lindsay*[3] : "The general rule is that the right of appeal from an inferior to a superior Court cannot be taken away except by express words. That is a rule which may be said to be subject to some qualification, because, if the jurisdiction exercised by the Sheriff is a jurisdiction which is expressly given to him by statute, and in which this Court has not previously had jurisdiction, it may be much more easily implied that the Sheriff's jurisdiction is not only privative, but final, and not subject to review." In that case the Lord President was dealing with the competency of an appeal from the Sheriff Court to the Court of Session, but his words are of general application.[4]

948. Where, however, a statute provides a special method of appeal it will be presumed that that method is exclusive.[5] On this ground appeals to the ordinary jurisdiction of the Court have been held

[1] 31 & 32 Vict. c. 100, ss. 64, 65, and 76.

[2] *Strain* v. *Strain*, 1886, 13 R. 1029, per Lord President Inglis at p. 1032.

[3] 1881, 8 R. 784.

[4] Cp. also *Magistrates of Portobello* v. *Magistrates of Edinburgh*, 1882, 10 R. 130, per Lord Justice-Clerk Moncreiff at p. 137 ; *Harper* v. *Inspector of Rutherglen*, 1903, 6 F. 23, per Lord Trayner at p. 25 ; *Parish Council of Strichen* v. *Goodwillie*, 1908 S.C. 835 ; *Jeffrey* v. *Angus*, 1909 S.C. 400, per Lord Justice-Clerk Macdonald at p. 402 ; *Kirkpatrick* v. *Parish Council of Maxwelltown*, 1912 S.C. 288.

[5] *County Council of Lanark* v. *Magistrates of Airdrie*, 1906, 8 F. 802.

incompetent.[1] In *Whitton* v. *Ewing, Aitken & Edgar*[2] the Court entertained an appeal, though it was not in the form of a stated case, as required by s. 14 of the Workmen's Compensation Act, 1906, on the ground that the Sheriff, by granting leave to appeal, had in effect stated a case for determination of a point of law. Reference is made to the various statutory headings for the forms of appeal competent thereunder.

Section 2.—Appeal from Sheriff-Substitute to Sheriff.

Subsection (1).—*Summary Causes and Applications.*

949. The Statute of 1907, as amended by that of 1913, classifies actions in the Ordinary Court under three heads—summary applications, summary causes, and ordinary actions. Summary applications are defined in s. 3, and the procedure in regard to them is prescribed in s. 50. They are to be tried summarily, and the judgment pronounced will not be appealable unless usage or the statute authorising the application allows it.[3] Summary causes are also defined in s. 3, and the procedure in regard to them is prescribed in s. 8. In both cases it is provided that no right of appeal, competent under any Act of Parliament in force for the time being, shall be affected (ss. 7 and 50). Failing such statutory provision, s. 8 provides that where evidence has been led and recorded, the judgment of the Sheriff-Substitute may be reviewed by the Sheriff both upon fact and law ; but where the evidence has not been recorded, the findings in law only are subject to review. If the findings in fact are based on documents produced and admitted, appeal in regard to such findings will probably be held competent, as the documents come in place of recorded oral evidence, and the Sheriff has the case as fully before him as the Sheriff-Substitute.

Subsection (2).—*Ordinary Actions—Appeal against Final Judgment.*

950. In ordinary actions, appeal against a Final Judgment is allowed by s. 27 of the statute, subject to its provisions. By s. 3 "final judgment" is defined as meaning "an interlocutor, which, by itself, or taken along with previous interlocutors, disposes of the subject-matter of the cause, notwithstanding that judgment may not have been pronounced on every question raised, and that expenses found due may not have been modified, taxed, or decerned for." The subject-matter of a cause is disposed of, even though it is continued, if what remains to be done

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[1] *Heritors of Pitsligo* v. *Gregor*, 1879, 6 R. 1062, Ecclesiastical Buildings Act, 1868 ; *Cammick* v. *Glasgow Iron and Steel Co.*, 1901, 4 F. 1682, Workmen's Compensation Act, 1897 ; *County Council of Lanarkshire* v. *Magistrates of Airdrie, supra*, Rivers Pollution Prevention Act, 1876 ; *Campbell's Trustees* v. *O'Neill*, 1911 S.C. 188, Judicature Act, 1825—warrant for summary ejection.

[2] 1911 S.C. 781.

[3] Cp. *County Council of Roxburgh* v. *Dalrymple's Trustees*, 1894, 21 R. 1063 ; *Thornhill District Committee* v. *M'Gregor & Son*, 1922 S.C. 512.

merely executorial of the decision already pronounced.[1] The subject-matter includes the question of expenses, and until that has been decided the judgment is not final, and cannot be appealed.[2] If the question of expenses has been expressly reserved, there is no final judgment till it has been disposed of;[3] and where it has been reserved and thereafter decided, it is not the decision on the merits, but the subsequent one on expenses, that is the final judgment.[4] It is not, however, necessary that the expenses should have been taxed, modified, or decerned for, and supplementary interlocutors doing any of these things are not final judgments in the sense of the section; and, except on the ground of incompetency,[5] such interlocutors cannot be appealed against if, for any reason, the final judgment in the cause has become unappealable.[6] Appeals on the question of expenses alone, while competent, are strongly discouraged, unless there has been a miscarriage of justice, or expenses have really become the merits, or a question of principle is involved.[7] It is not necessary that all the questions of fact or law in the case should have been decided, provided the decision, if well founded, leaves it unnecessary to decide anything further in order to dispose completely of the case.[8] Interlocutors which do not dispose of the whole subject-matter are not final judgments.[9]

Subsection (3).—*Appeal against Interlocutory Judgment.*

951. Appeal is also competent (s. 27) against an interlocutory judgment:—

(1) Granting or Refusing Interdict, Interim or Final. But an interim interdict, although appealed against, is binding till recalled (s. 29).

(2) Granting Interim Decree for Payment of Money other than a Decree for Expenses. A warrant to a judicial manager on a defender's estate to pay rent to a pursuer is equivalent to an interim decree for money;[10] and an interim decree for payment of a sum admittedly due

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[1] *M'Ewan* v. *Sharp*, 1899, 1 F. 393; *Turner's Trustees* v. *Steel*, 1900, 2 F. 363; cp. *Governors of Strichen Endowments* v. *Diverall*, 1891, 19 R. 79.

[2] *Greenock Parochial Board* v. *Miller & Brown*, 1877, 4 R. 737; *Russell* v. *Allan*, 1877, 5 R. 22; *Malcolm* v. *M'Intyre*, 1877, 5 R. 22; *Houston* v. *Gault*, 1925 S.C. 429.

[3] *Greenock Parochial Board*, *ut supra*.

[4] *Baird* v. *Barton*, 1882, 9 R. 970.

[5] *Macgillivray* v. *Mackintosh*, 1891, 19 R. 103.

[6] *Tennents* v. *Romanes*, 1881, 8 R. 824; *Thompson & Co.* v. *King*, 1883, 10 R. 469.

[7] *Fleming* v. *North of Scotland Banking Co.*, 1881, 9 R. 11; *Bowman's Trs.* v. *Scott's Trs.*, 1901, 3 F. 450; *Barrie* v. *Caledonian Railway Co.*, 1902, 5 F. 30; *Caldwell* v. *Dykes*, 1906, 8 F. 839; *Aird* v. *School Board of Tarbert*, 1907 S.C. 22, per Lord Kinnear at p. 24; *Wyllie* v. *Fisher*, 1907 S.C. 686.

[8] *Whyte* v. *Gerrard*, 1861, 24 D. 102; *Robb* v. *Eglin*, 1877, 14 S.L.R. 473; *Smith*, 1881, 18 S.L.R. 563.

[9] *Shirra* v. *Robertson*, 1873, 11 M. 660; *Gordon* v. *Graham*, 1874, 1 R. 1081; *Duke of Roxburghe*, 1875, 2 R. 715; *Wilson* v. *Brakenridge*, 1888, 15 R. 587; *Davidson*, 1891, 18 R. 884; *Governors of Strichen Endowments* v. *Diverall*, 1891, 19 R. 79; *Brotherston* v. *Livingston*, 1892, 20 R. 1; *M'Ewan* v. *Sharp*, 1899, 1 F. 393; *Turner's Trustees* v. *Steel*, 1900, 2 F. 363; see also *Adam & Sons* v. *Kinnes*, 1883, 10 R. 670; *Ross* v. *Wilson*, 1884, 12 R. 26; *Jardine* v. *Mags. of Moffat*, 1907 S.C. 1065.

[10] *Baird* v. *Glendinning*, 1874, 2 R. 25.

is also appealable and brings up a previous interlocutor partly disposing of the merits of which it is the logical sequence.[1] A warrant to uplift money consigned by the other party is appealable *quoad* that warrant.[2] But an order on a defender in an action of accounting for consignation of a sum of money is not an interlocutor giving interim decree for payment of money.[3]

(3) Making an Order *ad factum præstandum*. An order to consign money is a decree *ad factum præstandum* on which imprisonment may follow.[4] In *Maxton* v. *Bone*[5] it was held not appealable; but the ground of decision was that, not being an interim decree for payment of money, it did not fall within the grounds of appeal allowed by the Sheriff Courts (Scotland) Act, 1853, s. 24.

(4) Sisting an Action, or, where the order actually pronounced is equivalent to an interlocutor, sisting process.[6]

(5) Allowing Proof. If an action or a defence, or part of it, is irrelevant, proof of it should not be allowed—*frustra probatur quod probatum non relevat*: an opponent should not be put to the trouble, delay, and expense of leading a proof, or of meeting a proof, which is unnecessary or incompetent.

(6) Refusing Proof. If a pursuer or a defender is wrongfully refused the opportunity of proving his case or his defence, or part of it, appeal is needed in the interest of both parties. An interlocutor refusing a diligence for the recovery of documents is an interlocutor importing a refusal of proof.[7]

(7) Limiting the Mode of Proof, not being an Interlocutor fixing a diet for Jury Trial. If, for instance, the Sheriff-Substitute, in granting a proof to parties, limits it, or part of it, to proof by writ or by oath, then there is appeal. But the limitation must occur in the interlocutor allowing the proof; against it the aggrieved party has a right of appeal. If the limitation occurs in the course of the proof, then the deliverance of the Sheriff-Substitute may with his leave be appealed under the conditions specified in rule 5 of the statute.

(8) Where the Sheriff-Substitute grants leave either *ex proprio motu* or on the motion of any party. Leave must be got within the time allowed for taking the appeal.

(9) Where objections are taken to the competency or regularity of suspension proceedings (r. 125). Competency means competency in its strict sense, and the rule only applies to objections to a suspension as a form of process.[8]

(10) Where in a summary removing the defender has given in

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[1] *Cross & Sons* v. *Bordes*, 1879, 6 R. 934.
[2] *Sinclair* v. *Baikie*, 1884, 11 R. 413.
[3] *Maxton* v. *Bone*, 1886, 13 R. 912.
[4] *Mackenzie* v. *Balerno Paper Mill Co.*, 1883, 10 R. 1147.
[5] 1886, 13 R. 912.
[6] *Watson* v. *Stewart*, 1872, 10 M. 494; *Horn & Co., Ltd.* v. *Tangyes, Ltd.*, 1906, 8 F. 475.
[7] *Thomson & Co.* v. *Bowater & Sons*, 1918 S.C. 316.
[8] *Wilsons & Clyde Coal Co., Ltd.*, v. *Cairnduff*, 1911 S.C. 647; cp. *Bryson* v. *Belhaven Engineering and Motors, Ltd.*, 1908, 15 S.L.T. 1043.

answers, and caution for violent profits has been found or dispensed with, the cause is subject to review in common form (r. 122).

952. By the Act of 1907 certain interlocutors are expressly made not appealable—

1. Any interlocutor or order recalling, or incidental to the recall of a decree in absence (r. 33).

2. An interlocutor ordering, of consent of parties, a cause to be tried summarily (r. 40).

Subsection (4).—*Time for Appeal.*

953. Appeal, when competent, must be taken within certain specified times—

1. A final judgment may be appealed within three months if not sooner extracted or implemented (r. 86).

2. An interlocutor remitting an action on cause shown to another Sheriffdom may, with leave of the Sheriff-Substitute, be appealed within seven days (r. 20).

3. An interlocutor remitting a cause in which the Sheriff-Substitute has no jurisdiction to the proper Sheriff-Substitute may be appealed under the like conditions (r. 21).

4. A ruling upon objections to the admissibility of evidence taken during the course of the proof may be appealed, with leave of the Sheriff-Substitute, within seven days from the close of the proof if judgment has not been pronounced in the interval (r. 75).

5. If any person pleads confidentiality with reference to documentary or oral evidence, or, on pleas of alleged hypothec or otherwise, objects to produce documents, any party to the cause, or the person pleading confidentiality by leave of the Sheriff-Substitute, may in open Court take an appeal to the Sheriff (r. 76).

6. An interlocutor granting interim interdict may be appealed within fourteen days of the date of intimation (r. 86).

7. Other interlocutory judgments in which appeal is competent may be appealed within fourteen days if not sooner extracted (r. 86).

Subsection (5).—*Mode of Appeal.*

954. The mode of appealing is by writing on the interlocutor sheet that "the pursuer [or defender, or other party] appeals to the Sheriff." This note is signed by the Appellant or his agent, and bears the date of signature. Where the Sheriff-Clerk has not the interlocutor sheet in his hands, the note is made, signed, and noted as aforesaid on a separate paper, along with a certificate by the Sheriff-Clerk that he had not the interlocutor sheet (r. 87). When an appeal has been taken, the Sheriff-Clerk within two days transmits the process to the Sheriff, and sends written notice of the appeal to the other parties or their agents; but failure to give this notice does not invalidate the appeal (r. 88).

Subsection (6).—*Effect of Appeal.*

955. The Sheriff-Substitute, notwithstanding an appeal, has power to regulate all matters relating to interim possession,[1] to make any order for the preservation of any property to which the action relates, or for its sale if perishable, or for the preservation of evidence, or to make in his discretion any interim order which a due regard to the interests of the parties may require. Such orders are only subject to review at the hearing of the appeal by the Appellate Court (r. 91). An appeal does not prevent the immediate execution of a warrant of sequestration for rent, or of warrants to take inventories or place effects in custody *ad interim*, or of warrants for interim preservation, nor does it prevent an interim interdict from taking effect (s. 29). And an appeal granted against a ruling on a plea of confidentiality or alleged hypothec over documents does not prevent the Sheriff-Substitute proceeding with the cause as regards points not necessarily dependent upon the ruling so appealed against (r. 77).

956. An appeal submits to review the whole of the interlocutors pronounced in the cause, and is available to and may be insisted in by all other parties in the cause, notwithstanding they may not have noted separate appeals (s. 29). After appeal has been taken the appellant is not entitled to abandon it unless of consent of all parties, or by leave of the Appellate Court (r. 96). If one party has appealed an interlocutor to the Sheriff, the other party cannot thereafter appeal it to the Court of Session.[2]

Subsection (7).—*Disposal of Appeal.*

957. In an appeal in regard to the admissibility of evidence, or a plea of confidentiality, or an objection to produce documents on the ground of hypothec or otherwise, the Sheriff is to dispose of the appeal, with or without a hearing, with the least possible delay (rr. 75 and 76). In all other appeals the Sheriff may order a reclaiming petition and answers, or he may hear parties orally (r. 89), or, on the motion of both parties, and if he sees fit, he may dispose of the appeal without such reclaiming petition and answers or argument (r. 90). He may, at any stage of the cause, on such conditions as to expenses, reservice, or otherwise as he deems proper, allow the record to be altered or amended to the effect of determining the real question in controversy, notwithstanding that the conclusions of the action may thereby be enlarged or altered. These powers include amendment of the instance and the initial writ and the adding of parties (r. 79). If he intends to give expenses he must pronounce a finding to that effect ;[3] and if he has omitted to do so at the time he cannot do so afterwards.[4]

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[1] *Trainer* v. *Upper District Committee of Renfrewshire County Council*, 1907 S.C. 1117.
[2] *M'Arthur* v. *Boucher*, 1887, 15 R. 117.
[3] *Macdonald* v. *M'Eachan*, 1880, 7 R. 574. [4] *Drummond* v. *Bryden*, 1869, 8 M. 277.

Section 3.—Appeal from Sheriff-Substitute or Sheriff to Court of Session.

Subsection (1).—*General.*

958. A case may be appealed to the Court of Session from the Sheriff Court either for the purpose of reviewing the judgment pronounced or of having further procedure in the case conducted in the Court of Session. A summary application cannot be appealed to the Court of Session unless the statute under which it is brought expressly authorises it (s. 50).

Subsection (2).—*Interlocutors Appealable for Review.*

959. The provisions of the Sheriff Courts (Scotland) Acts, 1907 and 1913, as to appeal for review, are contained in s. 28, which enacts that, "subject to the provisions of this Act, it shall be competent to appeal to the Court of Session against a judgment of a Sheriff or of a Sheriff-Substitute, if the interlocutor appealed against is a final judgment; or is an interlocutor: (*a*) Granting interim decree for payment of money other than a decree for expenses; (*b*) sisting an action; (*c*) refusing a reponing note; or (*d*) against which the Sheriff or Sheriff-Substitute, either *ex proprio motu* or on the motion of any party, grants leave to appeal." These grounds of appeal are included in the grounds of appeal from a Sheriff-Substitute to a Sheriff under s. 27, and reference is made for their construction to what is said on that section *supra*.

Subsection (3).—*Value of Cause.*

960. Section 28 provides that no appeal shall be competent where the cause does not exceed £50 in value, exclusive of interest and expenses, or is being tried as a summary cause, unless the Sheriff, after final judgment by him, on an appeal on the motion of either party, made within seven days of the date of the final interlocutor, certifies the cause as suitable for appeal to the Court of Session. This section should be read along with s. 7, which provides that, subject to the provisions of the Act and of the Small Debt Act, all causes not exceeding £50 in value, exclusive of interest and expenses competent in the Sheriff Court, shall be brought and followed forth in the Sheriff Court only and shall not be subject to review by the Court of Session, subject always to any right of appeal under any Act of Parliament in force at the time.

961. Generally speaking, the test of value is the sum claimed in the initial writ,[1] or, where that is silent as to value, the pleadings.[2]

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[1] *Henderson* v. *Grant*, 1896, 23 R. 659, but cp. *Dickson & Walker* v. *John Mitchell & Co.*, 1910 S.C. 139, per Lord President Dunedin at p. 146.

[2] *General Guarantee Corporation* v. *Alexander*, 1918 S.C. 662.

Accordingly, where the original value has diminished in the course of the proceedings, the right of appeal will not be affected thereby.[1] This applies also to restriction of the sum originally sued for, provided the restriction takes place subsequent to the closing of the record.[2] Where, however, a practically new litigation arises as to a balance of less than £50, there is no appeal in regard to it, though the sum originally at stake exceeded £50.[3] So, again, where of several pecuniary conclusions, one alone remained, and it was below the statutory limit, appeal was held incompetent.[4] On the other hand, where actions are conjoined, the value of the cause is determined by the total amount in the conjoined actions.[5] Again, where a question of continuing liability is raised, an appeal will be competent, even though the sum concluded for is under the statutory limit.[6] The value of the cause is exclusive of interest (s. 7), and interest means all interest which is merely an accessory of the principal sum sued for.[7] Considerations extrinsic to the decree will not be taken into consideration in estimating the value.[8] Nor will the fact that the case is a test case make an appeal competent.[9] The objection that the case is of less value cannot be got over by consent,[10] nor by stating the action as a special case.[11] Nor may the requisite value be attained by assigning to one party, without consideration, debts under £50 due to others.[12] But the fact that the sum sued for is made up of sums under £50, due by different defenders, is immaterial, provided the total sum is sufficient.[13]

962. There is always right of appeal where the money value of the case is indefinite, as where less than £50 is concluded for, but with an alternative conclusion for such sum, more or less than £50 as may be found due;[14] as also in actions for interdict and *ad facta præstanda*, unless the averments disclose that the cause is less than £50 in value.[15] If in such actions there is an alternative conclusion for money, the amount of this determines whether the action can be appealed. If under £50, stated definitely, there is no appeal,[16] but stated indefinitely

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[1] *M'Kimmie's Trustees* v. *Armour*, 1899, 36 S.L.R. 675; 7 S.L.T. 21.

[2] *Buie* v. *Stiven*, 1863, 2 M. 208; *Cairns* v. *Murray*, 1884, 12 R. 167; *Tait* v. *Lees*, 1903, 5 F. 304.

[3] *Dobbie* v. *Thomson*, 1880, 7 R. 983.

[4] *David Allen & Sons Billposting, Ltd.* v. *Dundee and District Billposting Co.*, 1912 S.C. 970.

[5] *Campbell and Cowan & Co.* v. *Train*, 1910 S.C. 147.

[6] *Standard Shipowners' Mutual Association* v. *Taylor*, 1896, 23 R. 870; *Stevenson* v. *Sharp*, 1910 S.C. 580; *Abrahams, Ltd.* v. *Campbell*, 1911 S.C. 1029; *Melrose Parish Council* v. *Hawick Parish Council*, 1912 S.C. 1029.

[7] *Bowie* v. *Donaldson*, 1922 S.C. 9.

[8] *Brown & Critchley* v. *Decorative Art Journals Co.*, 1922 S.C. 192.

[9] *Parish Council of Stirling* v. *Parish Council of Perth*, 1898, 25 R. 964.

[10] *Singer Manufacturing Co.* v. *Jessiman*, 1881, 8 R. 695.

[11] *Bruce*, 1889, 17 R. 276.

[12] *Gibson, Thomson & Co.* v. *Bruce*, 1827, 5 S. 784.

[13] *Birrell* v. *Taylor*, 1884, 12 R. 151.

[14] *Wilson* v. *Addison*, 1845, 2 Broun 519; *Stott* v. *Gray*, 1834, 12 S. 828.

[15] *Broatch* v. *Pattison*, 1898, 1 F. 303; *General Guarantee Corporation* v. *Alexander*, 1918, S.C. 662.

[16] *Dickson* v. *Bryan*, 1889, 16 R. 673.

and alternatively, "or such other sum as may be found due," there is appeal.[1] With regard to the provisions of the Act of 1907 as to summary causes, it should be noted that the difficulties expressed by the Court in *Duke of Argyll* v. *Muir*,[2] and *Dickson & Walker* v. *John Mitchell & Co.*,[3] have been removed by the amending Act of 1913.

963. Section 28 provides further that nothing therein shall affect any right of appeal, or exclusion of such right, provided by any Act of Parliament in force for the time being.[4]

Section 4.—Appeals against the Verdict of a Jury.

964. Section 31 deals with jury trial in the Sheriff Court, and provides that the verdict of the jury shall be applied in an interlocutor by the Sheriff, which shall be the final interlocutor in the cause and which may, if shorthand notes of the proceedings have been taken,[5] be appealed within fourteen days thereof [6] on the grounds, (*a*) that the verdict has been erroneously applied; (*b*) that it is contrary to the evidence; (*c*) that evidence was unduly admitted or refused; (*d*) that the jury was misdirected; or (*e*) that the damages awarded were excessive or inadequate. On such appeal the Court may refuse the appeal, or find that the verdict was erroneously applied, and give judgment accordingly, or may set aside the verdict and order a new trial. If the judges are equally divided in opinion, the verdict is to stand.[7] It should be noted that many of the observations in the first three cases undernoted are no longer applicable in consequence of s. 32 of the Act of 1907 having been superseded by s. 6 of the Act of 1913.[8] Where an interlocutor applying the verdict is not appealable in terms of r. 147 in consequence of parties having dispensed with shorthand notes, the Court cannot, even in respect of irregularities in procedure, interfere in exercise of its *nobile officium*.[9] Where an appeal is taken on the ground that the verdict is contrary to evidence, the appellant must make clear in his note of appeal in what respect the evidence and the verdict are inconsistent.[10]

Section 5.—Procedure in Appeals.

Subsection (1).—*Time for Appeal.*

965. If the judgment appealed against is a final judgment, whether of the Sheriff-Substitute or the Sheriff, the appeal may be taken within three months of its date, unless it has been extracted or, if a judgment

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[1] *Aberdeen* v. *Wilson*, 1872, 10 M. 971. [2] 1910 S.C. 96. [3] 1910 S.C. 139.
[4] Cp. *Whitton* v. *Ewing, Aitken & Edgar*, 1911 S.C. 781, per Lord Ardwall at p. 787.
[5] First Schedule, Rule 147. [6] First Schedule, Rule 148.
[7] *Adamson* v. *Fife Coal Co.*, 1909 S.C. 396; *M'Vicar* v. *Robertson & Son*, 1910 S.C. 396; *Taylor* v. *Sutherland*, 1910 S.C. 644; *Ferguson* v. *North British Co.*, 1915 S.C. 566.
[8] Cp. also *Whitton* v. *Ewing, Aitken & Edgar*, 1915 S.C. 566.
[9] *Adair* v. *Colville & Sons*, 1922 S.C. 672.
[10] R. 148 and Form M; *Forsyth* v. *Plean Colliery Co.*, 1925 S.C. 76.

of the Sheriff, implemented.[1] Any other appealable interlocutor or judgment may, if not sooner extracted or implemented, be appealed within fourteen days.[2]

Subsection (2).—*Mode of Appeal.*

966. An appeal is taken by the appellant or his agent dating and signing a note on the interlocutor sheet in the following terms : "The pursuer (or defender or other party) appeals to the Division of the Court of Session." If the interlocutor sheets are not in the Sheriff-Clerk's hands (which fact must be certified by him), the note of appeal may be written on a separate paper and lodged along with the Sheriff-Clerk's certificate. Within two days of receiving the note of appeal, the Sheriff-Clerk must give written notice of it to the respondent or his agent, and should note that he has done so on the interlocutor sheet ;[3] but failure to do so does not invalidate the appeal. Within two days of receiving the appeal, the Sheriff-Clerk must transmit the process to the Clerk of the Division to which it is marked, who notes on it the date of receiving (s. 71, and rules 88 and 94).

Subsection (3).—*Boxing and Printing.*

967. The regulations as to boxing and printing are contained in C.A.S., D, iii., and the Acts of Sederunt 23rd November 1921 and 27th October 1922, and are to the following effect : Within fourteen days after the process has been received by the Clerk of Court, the appellant must print and box or, if in vacation, deposit with the Clerk the note of appeal, record, and interlocutors, unless within eight days after the process has been received he has obtained an interlocutor of the Court, or if in vacation, of the Lord Ordinary on the Bills (for which purpose, if necessary, the process must be laid before him by the Assistant Clerk), dispensing with printing in whole or in part ;[4] if in part, it is necessary to print and box, or deposit, only those papers whereof printing has not been dispensed with ; if in whole, the appellant lodges with the Clerk of Court and also, if in session, with the Clerk of the President of the Division, a manuscript copy of the note of appeal. In vacation the period within which the appellant must lodge with the Clerk of Court the necessary prints, or if printing has been dispensed with, the manuscript copy, is likewise fourteen days ; and on the first box day or sederunt day following such deposit in vacation, if there are prints, these are boxed to the Court, and if there are none, a manuscript copy is furnished to the Clerk of the President of the Division.

968. Unless printing has been dispensed with, the proof, if any, where it is material to the consideration of the cause, must be printed,

[1] Rules 86 and 92.
[2] Rules 86 and 92 ; *William Baird & Co.* v. *Breton*, 1925, S.L.T. 613.
[3] *Chisholm* v. *Marshall*, 1874, 1 R. 388.
[4] *Ross* v. *Gray*, 1887, 14 R. 768 ; *Campbell* v. *Farquhar*, 1917 S.C. 365.

lodged, and boxed to the Court in time for the hearing of the appeal.[1] Any documents requisite to make the case intelligible must also be printed in time for the hearing.[2] Where a second appeal is taken it is not necessary to reprint papers already printed and boxed, but they may be referred to by their description and date of boxing.[3] By the Act of Sederunt, 27th October 1922, a standard substitute, a copy of which is to be exhibited in each office of the Court, is approved in place of prints of proofs and appendices of documents and copies which conform to that standard in size, spacing, lettering, legibility, and otherwise (reproduced by any method whatsoever), are to be accepted by the Clerks of Court and Boxing Clerks. The decision of such clerks is subject to appeal, written on the substitute and signed by or for the agent, appealing to the Principal Clerk of Session, whose decision is to be final. If an appeal is imperfectly printed, the Court may find the appellant or agent liable in expenses.[4]

Subsection (4).—*Abandonment and Reponing.*

969. If the appellant, either in session or vacation, fails to observe any of these requirements, he is held to have abandoned his appeal ;[5] but within eight days after it is held to be so abandoned he may move the Court in session, or the Lord Ordinary on the Bills in vacation, to repone him, which is only granted on cause shown,[6] and on such terms as to printing, payment of expenses to the respondent, or otherwise, as seem just.[7] On the other hand, also within the eight days, the respondent by printing and, if in session, boxing the papers himself, and, if in vacation, by lodging a copy thereof with the Clerk of Court, may insist in the appeal, in which case the appellant may insist also.[8] If, however, the eight days elapse, and the appellant is not reponed and the respondent does not desire to insist, then the judgment or judgments complained of become final, and cannot thereafter be reviewed by appeal or suspension ;[9] and the process is retransmitted to the Sheriff-Clerk, the Clerk of Court or his assistant having first engrossed on the interlocutor sheet and signed a certificate to this effect : "(*Date*) —Retransmitted in respect of the abandonment of the appeal." This certificate is a warrant to the judge of the Sheriff Court to award, on motion made, three guineas of expenses to the respondent.[10] The Court has no power to dispense with the observance of these provisions.[11]

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[1] A.S., 23rd Nov. 1921. [2] *Muir* v. *Mackenzie*, 1881, 9 R. 10.
[3] *Dougall's Trs.* v. *Lornie*, 1900, 2 F. 1123.
[4] *Roxburgh & Co.* v. *Barlas*, 1876, 3 R. 288 ; *Burrell* v. *van t'Hoff*, 1915 S.C. 832.
[5] Cp. *Weir* v. *Tudhope*, 1892, 19 R. 858.
[6] *White* v. *Rothesay Tramways Co.*, 1909 S.C. 760 ; *Reid* v. *Nimmo & Co.*, 1909, 1 S.L.T. 460 ; cp. *Burrell* v. *van t'Hoff*, 1915 S.C. 832.
[7] C.A.S., D, iii. 1, 2, 3. [8] C.A.S., D, iii. 4.
[9] *Watt Brothers & Co.* v. *Foyn*, 1879, 7 R. 126. [10] C.A.S., D, iii. 5.
[11] *Taylor* v. *Macilwain*, 1900, 3 F. 1 ; *Bennie* v. *Cross & Co.*, 1904, 6 F. 538 ; *Creighton* v. *Wylie & Lochhead, Ltd.*, 1915 S.C. 305.

Mere inaccuracies may, however, be corrected, *e.g.* adjustments on open record not included,[1] or omission to print note of appeal.[2]

970. These provisions as to printing and boxing apply to appeals against interlocutors applying the verdict of a jury, with this proviso that it is not necessary to print any notes of the evidence, unless the Court of Session so appoints.[3] Where in such appeals a new trial is ordered, the party wishing to proceed with the cause in the Sheriff Court must furnish the Sheriff-Clerk with a certified copy of the interlocutor making such order.[4]

Subsection (5).—*Objections to Competency.*

971. Objection to the competency of the appeal is properly stated in Single Bills, but may be entertained later.[5] The Court will not entertain an incompetent appeal, even when parties desire to waive any objection thereto.[6]

Subsection (6).—*Effect of Appeal.*

972. The appeal brings under review all judgments (other than those which are not steps in the process, such as a caption [7]) that have been pronounced in the case, whether final or interlocutory,[8] and may be insisted in by all other parties in the case, notwithstanding that they may not have noted separate appeals (s. 29). Extract of an interlocutory judgment does not exclude it from review.[8]

Subsection (7).—*Withdrawal of Appeal.*

973. An appellant may not withdraw or abandon an appeal without consent of all parties or leave of the Appellate Court (r. 96). Withdrawal before the case is sent to the Roll entails a payment of expenses, usually modified at £3, 3s. The Appellate Court has, however, complete discretion in the matter of expenses,[9] and if withdrawal is made later, a larger amount may be awarded.[10] If the respondent absent himself from the hearing, the Court will not sustain the appeal without argument sufficient to warrant it.[11]

Subsection (8).—*Hearing and Disposal.*

974. The record may, with leave, be amended on such conditions as the Court thinks proper,[12] and the Court gives judgment according to

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[1] *Newton* v. *Methven*, 1914 S.C. 753; but see *contra Lee* v. *Maxton*, 1904, 6 F. 346.
[2] *Young* v. *Brown*, 1875, 2 R. 456.
[3] C.A.S., D, iii. 6.
[4] C.A.S., D, iii. 7.
[5] *Houston* v. *Gault*, 1925 S.C. 429.
[6] *Governors of Strichen Endowments* v. *Diverall*, 1891, 19 R. 79.
[7] *Broatch* v. *Pattison*, 1898, 1 F. 303.
[8] *Weir* v. *Tudhope*, 1892, 19 R. 858.
[9] *M'Guire* v. *Union Cold Storage Co., Ltd.*, 1909 S.C. 384.
[10] *Gilchrist & Co.* v. *Smith*, 1901, 3 F. 329.
[11] *Dunbar* v. *Macadam*, 1884, 11 R. 652.
[12] *Rose* v. *Johnston*, 1878, 5 R. 600.

the law truly applicable to the circumstances, whether it is pleaded on record or not.[1] Where, however, a new ground of action, or a new defence, is adopted after evidence at proof, the Court will not take cognisance thereof, unless the appropriate amendments are made on the record.[2]

975. The Court, after hearing, may remit the case to the Sheriff for further procedure, or may order proof or additional proof to be taken in the same way as proof in a case before the Inner House, or may dispose of the case without any such order; or it may send the case to be tried by a jury.[3]

Subsection (9).—*Interim Orders pending Appeal.*

976. Interim possession till the hearing of the appeal is regulated by the Sheriff, who has power also to make any order for the preservation of property to which the action relates, or for its sale, if perishable, or for the preservation of evidence, or to make, in his discretion, any interim order which a due regard to the interests of the parties may require. Such orders are not subject to review except by the Appellate Court at the hearing of the appeal (r. 91).[4] An appeal does not prevent immediate execution of a warrant of sequestration for rent, or of warrants to take inventories, or to place effects in custody *ad interim*, or warrants for interim preservation; and an interim interdict, though appealed against, is binding till recalled (s. 29).

Subsection (10).—*Miscellaneous.*

977. If the case has been appealed to the Sheriff by one party, it cannot be appealed to the Court of Session by any other party till the pending appeal is disposed of.[5]

978. Any deviation from the statutory proceedings in the Court below, to which the parties give their consent, may amount to the constitution of the Sheriff as arbiter and deprive parties of their right of appeal.[6]

Section 6.—Appeal for Jury Trial.

Subsection (1).—*Actions Appealable.*

979. This appeal, which was formerly regulated by 6 Geo. IV. c. 120, s. 40, is now regulated by s. 30 of the Sheriff Courts (Scotland) Acts, 1907 and 1913, which provides that "in cases originating in the Sheriff Court (other than claims by employees against employers in respect of injury

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[1] Court of Session Act, 1868 (31 & 32 Vict. c. 100), s. 72.

[2] *Black* v. *John Williams & Co.* (*Wishaw*), 1924 S.C. (H.L.) 22; "*Vitruvia*" *S.S. Co.* v. *Ropner Shipping Co.*, 1924 S.C. (H.L.) 31.

[3] *M'Donagh* v. *P. & W. MacLellan*, 1886, 13 R. 1000; *Mitchell* v. *Sellar*, 1915 S.C. 60; *M'Lachlan* v. *Lewis*, 1925 S.C. 577.

[4] *Trainer* v. *Renfrewshire Upper District Committee*, 1907 S.C. 1117.

[5] *M'Arthur* v. *Boucher*, 1887, 15 R. 117.

[6] *Gordon* v. *Bruce & Co.*, 1897, 24 R. 844; *Stark's Trustees* v. *Duncan*, 1906, 8 F. 429.

caused by accident arising out of and in the course of their employment and concluding for damages under the Employers' Liability Act, 1880, or alternatively at common law or at common law or under the Employers' Liability Act, 1880), where the claim is in amount or value above £50, and an order has been pronounced allowing proof (other than an order for proof to lie *in retentis* or for recovery of documents) it shall, within six days thereafter, be competent to either of the parties, who may conceive that the cause ought to be tried by jury, to require the cause to be remitted to the Court of Session for that purpose where it shall be so tried : Provided, however, that the Court of Session shall, if it thinks the case unsuitable for jury trial, have power to remit the case back to the Sheriff, or to remit it to a Lord Ordinary, or to send it for proof before a judge of the Division before whom the cause depends."

980. " Employee " includes the legal personal representative of an employee and any person who, by the law of Scotland, may be entitled to solatium in respect of the death of an employee (s. 3 *q*). In such cases where the claim is above £50, jury trial may be obtained in the Sheriff Court. See JURY TRIAL (SHERIFF COURT). As to the principles determining the value of the cause, see *supra*, para. 960. In *Ellerman Lines, Ltd.* v. *Clyde Navigation Trs.*,[1] L. P. Dunedin observed that the code of procedure for the removal of a cause to the Court of Session for jury trial contained in s. 30 of the Act and s. 4 of the Act of Sederunt of 5th January 1909 (now C.A.S., 1913, D, iv) stands by itself, and is exclusive of the code of appeal proper, contained in s. 28 of the Act, and that it is for the litigant in the Sheriff Court where a proof has been ordered to make his election between the two methods of procedure. The procedure in the Court of Session under s. 30 is governed by C.A.S., 1913, D, iv. The time within which appeal can be taken runs from the date of the principal interlocutor, and not from that of any supplementary one, such as an interlocutor fixing a diet or assigning a new diet.[2] Leave to appeal must be obtained in time to allow of the appeal being taken within the above period.[3]

SUBSECTION (2).—*Interlocutors Appealable.*

981. The stage of the action at which appeal is competent is after an order for proof at large. It may be proof " before answer " ;[4] or proof as to only a part of the case,[5] unless the proof allowed is of a purely preliminary question.[6] But an allowance of proof by writ or

[1] 1909 S.C. 694.

[2] *Kinnes* v. *Fleming*, 1881, 8 R. 386 ; *Williams* v. *Watt & Wilson*, 1889, 16 R. 687 ; *Davidson* v. *Davidson's Exr.*, 1891, 18 R. 1069.

[3] *Duff* v. *Steuart*, 1881, 9 R. 17.

[4] *Stewart* v. *Rutherfurd*, 1862, 24 D. 1442.

[5] *Robertson* v. *Earl of Dudley*, 1875, 2 R. 935 ; *Conroy* v. *Inglis*, 1895, 22 R. 620.

[6] *Tulloch* v. *Mackintosh*, 1838, 16 S. 983 ; *M'Coll* v. *Gardner & Co.*, 1898, 25 R. 395 ; *Curran* v. *M'Alpine & Son*, 1898, 1 F. 326.

oath only [1] is not an order for proof entitling a party to appeal for jury trial. An order for proof cannot be appealed for jury trial if at the time it is under appeal from the Sheriff-Substitute to the Sheriff.[2]

Subsection (3).—*Time and Method of Appeal.*

982. The rules as to boxing, printing, and stating objections to the competency are given in C.A.S., 1913, D, iv. 4, which provides that the regulations as to appeals for review on the merits shall apply, subject to the qualification that in the event of abandonment the docquet written by the Clerk of Court or his assistant shall be : " Retransmitted in respect of the abandonment of 'the remission.'" In cases remitted *ex proprio motu* by the Sheriff, the pursuer or party leading in the cause is to act as if he were appellant and the other party as respondent. Should the former fail to print and proceed within fourteen days of the process being received by the Clerk of Court, any other party to the cause may print and proceed within the eight days succeeding. Otherwise the pursuer or party leading may move the Court or Lord Ordinary on the Bills during the eight days to be reponed on cause shewn in the same manner as is provided in the case of appeals. On the expiry of the eight days without printing or reponing, the clerk of Court is to retransmit the process to the Clerk of the Inferior Court as a cause in which the remission has been abandoned with a docquet in the above terms. In respect of that docquet the Sheriff, on motion made, pronounces such order as may be just, and is given power to deal with the expenses of the remission as expenses in the cause.

Subsection (4).—*What Cases considered suitable for Jury Trial.*

983. The principles according to which the Court will determine how to deal with cases remitted for trial by jury are laid down in *Sharples* v. *Yuill & Co.*[3] which, though decided under the former practice, is still applicable. That case, which contains an exhaustive examination of the earlier authorities by L. P. Dunedin, lays down that, when a case is appealed for jury trial, the Court, as is provided by s. 30 of the Acts of 1907 and 1913 (*supra*), is not bound to grant a jury trial, but may (*a*) decide the case on any legal ground which will allow the case to be disposed of without inquiry; or (*b*) order inquiry by some other method than jury trial, if it considers jury trial unsuitable, and that either by proof before a Judge in the Court of Session or by proof before the Sheriff. In deciding between the two, the Court will keep in view, in relation to the nature of the case, that the one course will and the other will not allow of ultimate appeal to the House of Lords on the facts. In deciding whether the case is suitable for jury trial,

[1] *Shirra* v. *Robertson*, 1873, 11 M. 660; *Wilson* v. *Brakenridge*, 1888, 15 R. 587.
[2] *M'Arthur* v. *Boucher*, 1887, 15 R. 117.
[3] 1905, 7 F. 657.

it will apply the same criteria as it does in cases raised before itself, *i.e.* it will consider whether the case is of the class specially appropriated by statute to jury trial, and, if so, whether there is any special reason for not so trying it. As to amount, unless the action, on the face of it, discloses a claim which, in the opinion of the Court, could not reasonably be entitled to a verdict of more than £50, it will not refuse a jury trial, if it is otherwise appropriate.

Section 7.—Removal for further Procedure in the Court of Session.

984. Either party at the closing of the record or within six days thereafter may (s. 5) require the cause to be remitted to the Court of Session " in the case of actions—

(*a*) Relating to questions of heritable right and title where the value of the subject in dispute exceeds fifty pounds by the year or one thousand pounds in value :

(*b*) Relating to the right of succession to moveables where the value of the subject in dispute exceeds one thousand pounds :

(*c*) Relating to division of commonty or division or division and sale of common property where the value of the subject in dispute exceeds fifty pounds by the year or one thousand pounds value."

(*d*) " On cause shewn or *ex proprio motu* the Sheriff may at any stage remit to the Court of Session "—

(1) Actions of declarator so far as competent in the Sheriff Court.

(2) Actions of aliment so far as competent in the Sheriff Court, and including as between husband and wife actions of separation and aliment, adherence and aliment, or interim aliment, and actions for regulating the custody of children.

(3) Actions of division and commonty and of division or division and sale of common property.

(4) Actions relating to questions of heritable right or title, so far as competent in the Sheriff Court, including all actions of declarator of irritancy and removing, whether at the instance of a superior against a vassal or of a landlord against a tenant.

(5) Suspension of charges, or threatened charges upon the decrees of Court granted by the Sheriff, or upon decrees of registration proceeding upon bonds, bills, contracts, or other obligations, registered in the books of the Sheriff Court, the books of Council and Session, or any others competent, where the debt, exclusive of interest and expenses, does not exceed fifty pounds.

The rules as to procedure are given in C.A.S., 1913, D, iv., and are the same as in appeals for jury trial.

Section 8.—Removal on the Ground of Contingency.

985. When an action in the Sheriff Court stands in such a relation to an action in the Court of Session that, if both were pending in the same Court, they would be conjoined, it may be removed to the Court of Session. The party desirous of this course lays before the Lord Ordinary, or the Division before which the Court of Session process is pending, a certified copy of the process in the Sheriff Court ; and if the Division or the Lord Ordinary are satisfied that there is contingency between the processes, warrant is granted for the transmission of the Sheriff Court process.[1] The decision of the Division or of the Lord Ordinary is final at that stage ; but if refused, the motion for transmission may be renewed at any subsequent stage of the cause.[2]

Section 9.—Review where Appeal Incompetent.

986. An extracted final judgment cannot be appealed against, nor can an unextracted one if three months have elapsed from its date. In these cases, as also where extract is unnecessary to enforce the decree, or where it is issued too soon to permit of appeal, the mode of review is by suspension, or reduction, in the Court of Session. See Suspension ; Reduction.

Section 10.—Incompetency as Ground of Appeal.

987. Incompetency, including defect of jurisdiction and personal objection to the Judge, is one of the grounds on which a cause may be appealed from an inferior Court to the Court of Session. Formerly this was a statutory ground of appeal ; but s. 36 of the Court of Session Act, 1825,[3] which provided for advocations (afterwards appeals) on these grounds, was repealed by the Second Schedule of the Sheriff Courts (Scotland) Acts, 1907 and 1913. So far, therefore, as a right of appeal on these grounds still exists, it depends on "the common law power of the Court to control irregular proceedings in inferior Courts."[4] This common law right is recognised by Erskine.[5] While it does not clearly appear that the effect of the repeal of the statutory provision is to do away with appeal in such cases, as a method of review, it is probable that the better course would be to proceed by way of suspension or reduction. See Suspension ; Reduction.

Section 11.—Appeal from Sheriff of Chancery.

988. The procedure in appeals from the Sheriff of Chancery to the Court of Session is regulated by the Titles to Land Consolidation Act[6] and the Court of Session Act, 1868.[7]

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[1] Court of Session Act, 1868 (31 & 32 Vict. c. 100), s. 74. [2] *Ibid.*, s. 75.
[3] 50 Geo. III. c. 112. [4] Mackay, Practice of the Court of Session, v. ii. 457.
[5] Inst., iv. 2, 40, 42. [6] 31 & 32 Vict. c. 101, ss. 41–4. [7] 31 & 32 Vict. c. 100.

989. In all cases where competing petitions for service of heirs have been presented to the Sheriff of Chancery, or where anyone competently appears to oppose a service, any of the parties may, at any time before proof is begun to be taken by the Sheriff, remove the proceedings to the Court of Session by note of appeal, which note of appeal is proceeded with in the same manner as appeals for jury trial from the Sheriff Courts ; and where the jury find a verdict in favour of a party petitioning to be served, a remit is made by the Court to the Sheriff, with instructions to serve.

990. Where, again, the Sheriff pronounces a decree refusing to serve, or repelling the objections of an opposing party, the decree may be brought under review of the Court of Session by note of appeal presented within fifteen days, and the appeal is dealt with in the same manner as appeals against final judgments of the Sheriff Courts. The Court may, if they think fit, allow further evidence to be taken, either by way of proof [1] or jury trial ; and when the Sheriff has refused to serve, and the Court determine that the party ought to be served, a remit is made to the Sheriff, with instructions to serve. Decrees of service by the Sheriff may also be brought under review by process of reduction in the Court of Session, and the Court may allow further evidence to be taken by way of proof or jury trial ; and where the decree brought under reduction has proceeded on competing petitions, and the Court of Session determines that a different person should be served from the person preferred by the Sheriff, a remit is made to the Sheriff, with instructions to serve such person. The judgments of the Court of Session in appeals and reductions are appealable to the House of Lords, in the same manner as judgments in ordinary civil causes. The procedure in appeals from the Sheriff of Chancery is applicable also to petitions for service presented to Sheriffs of counties. See CHANCERY.

SECTION 12.—APPEAL TO HOUSE OF LORDS.[2]

SUBSECTION (1).—*Preliminary.*

991. The House of Lords is the ultimate Court of Appeal for the three kingdoms. In disposing of appeals from the Scottish Courts, it is bound to apply, and does apply, the law of Scotland. But it is an imperial tribunal, and in applying principles of law that are common to the jurisprudence of the three countries, its decisions are binding in Scotland, although pronounced in an English or Irish litigation.[3] For

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[1] *Sir A. Moncrieff* v. *Lord Moncreiff*, 1904, 6 F. 1021.

[2] See Macqueen, Appellate Jurisdiction ; Denison & Scott, Appeal Practice ; Mackay, Manual of Practice, 579 ; Coldstream, Procedure, 243 ; Spink, Handbook of Procedure, 198 ; Maclaren, Court of Session Practice : for forms, see Standing Orders and Directions before referred to, Juridical Styles, iii. 733, and the Scots' Style Book, v. 5.

[3] *Virtue* v. *Commissioners of Police of Alloa*, 1873, 1 R. 285 ; *Orr Ewing's Trs.* v. *Orr Ewing*, 1885, 13 R. (H.L.), per Lord Selborne, Lord Chancellor ; *Blacks* v. *Girdwood*, 1885, 13 R. 243.

this reason questions as to the law of England or Northern Ireland, arising in a Scottish litigation, while they are questions of fact for the Court of Session, are questions of law for the House of Lords.[1] Similarly when the opinion of an English or Irish Court has been obtained, on case stated, for the purposes of a litigation in a Scottish Court, the House may adopt or reject the opinion, as the same may appear to be well founded or not in law.[2]

Subsection (2).—*Competency of Appeal.*

992. Appeal is competent from the decisions of the Inner House of the Court of Session, but not from the judgment of a Lord Ordinary which has not been submitted to review.[3] Appeal is also competent from decisions of the Teind Court,[4] from judgments pronounced by the Court in the exercise of its Bill Chamber jurisdiction,[5] in Exchequer cases[6] and in Workmen's Compensation cases.[7] There is no appeal against decisions of the Registration Appeal Court,[8] or of the Lands Valuation Appeal Court.[9] Nor is there any appeal from the High Court of Justiciary.[10] There is no appeal against the verdict of a jury in civil cases, but interlocutors allowing or refusing bills of exceptions may be appealed,[11] as also may interlocutors applying the verdict (s. 9). Interlocutors granting or refusing a new trial after discussion upon a rule are not appealable (s. 6); but this exclusion of appeal is not imported into the Jury Trials Amendment (Scotland) Act, 1910,[12] so that there is a right of appeal against an interlocutor of one of the Divisions of the Inner House, pronounced under s. 2 of that Act, setting aside the verdict of a jury and in place of granting a new trial, entering judgment for the party unsuccessful at the trial.[13] When a Lord Ordinary tries issues of consent without a jury, the judgment of the Division upon the law is appealable.[14]

993. Every final judgment of the Inner House is appealable (unless appeal is excluded by statute), but appeal against interlocutory

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[1] *Cooper* v. *Cooper*, 1888, 15 R. (H.L.) 1.
[2] The British Law Ascertainment Act, 1859 (22 & 23 Vict. c. 63), s. 4.
[3] Court of Session Act, 1808 (48 Geo. III. c. 151), s. 15.
[4] *Minister of Kirkden* v. *The Heritors*, 1784, Mor. 7479; *Minister of Prestonkirk* v. *Earl of Wemyss*, 1808, Mor. Stipend, App. 6, note; The Teinds Act, 1808 (48 Geo. III. c. 138, s. 4).
[5] *Fleming* v. *Dunlop*, 1839, Macl. & Rob., 547; *Black* v. *Clay*, 1893, 21 R. 41; 1894, 21 R. (H.L.) 72.
[6] Court of Exchequer (Scotland) Act (19 & 20 Vict. c. 56), s. 20.
[7] Workmen's Compensation Act, 1906 (6 Edw. VII. c. 58, Second Sched. 17 (*b*)); cp. *Jackson* v. *General Steam Fishing Co.*, 1909 S.C. (H.L.) 37.
[8] Representation of the People Act, 1868 (31 & 32 Vict. c. 48), s. 22.
[9] Valuation of Lands (Scotland) Amendment Act, 1867 (30 & 31 Vict. c. 80), s. 8.
[10] *Mackintosh* v. *H.M. Advocate*, 1876, 3 R. (H.L.) 34; Criminal Procedure Act, 1887 (50 & 51 Vict. c. 35), s. 72.
[11] Jury Trials (Scotland) Act (55 Geo. III. c. 42), s. 7.
[12] 10 Edw. VII. and 1 Geo. V. c. 31.
[13] *Lyal* v. *Henderson*, 1916 S.C. (H.L.) 167.
[14] Court of Session Act, 1850 (13 & 14 Vict. c. 36), s. 47.

judgments is competent only in cases in which there is a difference of opinion among the judges, or, if they are unanimous, with leave of the Court.[1] No consent or waiver will authorise the House of Lords to entertain an appeal contrary to the provisions of this section.[2] In very exceptional circumstances, the House of Lords has entertained an appeal against a unanimous interlocutory judgment without leave.[3] If a dilatory defence, leading to the dismissal of the action, is sustained, leave is not required.[4] When an appeal is taken against an interlocutory judgment, the counsel who sign the petition of appeal, or two of the counsel for the appellant in the Court below, must certify either that leave has been given, or that the judgment was not unanimous.[5] Appeal on a question of expenses only is incompetent.[6]

Subsection (3).—*Leave to Appeal.*

994. Leave is obtained, in cases where it is necessary, upon petition presented to the Court pronouncing the judgment appealed against. In granting or refusing leave to appeal, the Court has an absolute discretion, and no rule of universal application can be formulated. The leading consideration is to prevent, if it be possible, two appeals in the same case.[7] If the Court has had difficulty, or the judges have decided upon different grounds, leave will be more readily given ; and where a reversal of the interlocutor appealed against would conclude the cause, or where the disadvantages to the appellant from compelling him to exhaust the case in the Court of Session outweigh those which the respondent would suffer from delay, leave will in general be granted. But leave will rarely be given to appeal upon questions of title, relevancy, or procedure.

Subsection (4).—*Time allowed for Appeal.*

995. The time within which appeals from the Court of Session might be presented was formerly regulated by the Court of Session Act, 1825.[8] Under that Act the period allowed for appeal was two years from the date of the last interlocutor appealed from, and there were provisions extending the time in the case of any person out of the United Kingdom under age, or *non compos mentis*. Under the Jury Trials (Scotland) Act, 1815,[9] appeal against an interlocutor allowing or refusing a Bill of Exceptions required to be taken within fourteen days if Parliament were sitting, or if not, within eight days of the commencement of the next session; and under the Court of Session

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[1] Court of Session Act, 1808 (48 Geo. III. c. 151), s. 15.
[2] *Beattie* v. *Glasgow Corporation*, 1917 S.C. (H.L.) 22.
[3] *Orr Ewing's Trs.* v. *Orr Ewing*, 1885, 13 R. (H.L.) 1.
[4] Court of Session Act, 1825 (6 Geo. IV. c. 120), s. 5.
[5] Standing Order of the House of Lords, 1876, No. 9.
[6] *Barrie* v. *Caledonian Rly. Co.*, 1903, 5 F. (H.L.) 10.
[7] *Stewart* v. *Kennedy*, 1889, 16 R. 521; *Edinburgh Northern Tramways Co.* v. *Mann*, 1891, 18 R. 1152.
[8] 6 Geo. IV. c. 120, s. 25.
[9] 55 Geo. III. c. 42, s. 7.

Act, 1850, an appeal against the judgment of the Inner House reviewing that of the Lord Ordinary, upon issues tried by him without a jury, had to be taken within the same time.[1] The Appellate Jurisdiction Act, 1876,[2] s. 11, provided: "After the commencement of this Act . . . . an appeal shall not lie from any of the Courts from which an appeal to the House of Lords is given by this Act, except in manner provided by this Act and subject to such conditions as to the . . . . time within which the appeal shall be brought . . . . as may be imposed by orders of the House of Lords." Up to 1st June 1907 the Standing Orders of the House of Lords regulating the time within which appeals should be brought contained an express reservation in favour of any statutory provision dealing with the matter, so that until that date the provisions of the statutes above mentioned continued to regulate Scots Appeals. In that year the reservation in question was dropped from the Standing Orders so that Scots Appeals thereafter fell within the terms of the Standing Order, and the time for presenting all such appeals became one year as in England and Ireland. On 1st April 1916 the time was again reduced and the Standing Order at present ruling the matter is in the following terms: "Ordered that no petition of appeal be received by this House unless the same be lodged in the Parliament Office for presentation to the House within six months from the date of the last decree, order, judgment, or interlocutor appealed from."

Subsection (5).—*Findings in Fact.*

996. Where there has been proof in an inferior Court, the judgment of the Court of Session on appeal must distinguish by separate findings the facts held proved and the law held applicable to the case. The latter findings only are appealable to the House of Lords.[3] As to what are findings in fact, and what are findings in law, when mixed findings have been pronounced, see the cases undernoted.[4] Where it can be shown that the Court of Session has not exhausted the issue before it, and that there are material questions of fact left undetermined, a remit will be made to the Court below to pronounce findings upon these questions, but the omission can only be shown by reference to the judgment and the record, not to the proof.[5] In one Whole Court case where the judges were much divided in opinion, and the facts held proved were not properly discriminated from the law in the interlocutor, though it was clear from the opinions of the majority what were the facts held proved by them, the House proceeded to judgment without putting parties to the trouble and expense of a remit to have a proper separation made.[6]

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[1] 13 & 14 Vict. c. 36, s. 47.

[2] 39 & 40 Vict. c. 59.

[3] Court of Session Act, 1825 (6 Geo. IV. c. 120), s. 40.

[4] *Shepherd* v. *Henderson*, 1881, 9 R. (H.L.) 1; *Fleming* v. *Hislop*, 1886, 13 R. (H.L.) 3.

[5] *Mackay* v. *Dick & Stevenson*, 1881, 8 R. (H.L.) 37; *Gilroy, Sons & Co.* v. *Price & Co.*, 1892, 20 R. (H.L.) 1.

[6] *Caird* v. *Sime*, 1887, 14 R. (H.L.) 37.

The House of Lords will not disturb concurring judgments in the Court of Session on questions of fact, unless they are clearly shewn to be erroneous.[1] Where the Inner House has differed from the Lord Ordinary on questions of fact the House will attach great weight to the opinion of the Lord Ordinary who saw and heard the witnesses, though where questions of credibility are not involved they will not hesitate to review his findings.[2]

Subsection (6).—*Procedure in Appeals.*

997. The Standing Orders and Directions by which procedure before the House of Lords is now regulated are printed at length in the *Parliament House Book* (published annually). Appeal is taken by the presentation to the House of a petition praying that the interlocutor or interlocutors set forth in the schedule appended to the petition be reviewed before His Majesty the King in his Court of Parliament, and be reversed, varied, or altered, or that the petitioner may have such other relief in the premises as may seem meet. The petition also prays that the respondent be ordered to lodge such printed case as may be necessary in answer to the appeal, and that service of the order upon his solicitors may be deemed good service.[3] The petition and relative schedule must be signed by two counsel, and they must also certify that they conceive the case to be proper for appeal (Standing Order 2). Two clear days' notice of intention to present the appeal, together with a correct copy of it, must be served upon the respondent or his solicitor prior to presentation, and a certificate of such service entered on the appeal. It is usual and convenient to deliver to the respondent's agent at least five additional printed copies of the appeal. The appeal, and six printed paper copies thereof, may then be lodged in the Parliament Office; and if the House be sitting, or, if not, then at the next ensuing meeting of the House, the appeal will be presented, and an order made requiring the respondent to lodge a printed case in answer to the appeal. The appellant's agent receives notice from the Judicial Office when this order has been engrossed, and attends there with the notice and a stamp for £2 affixed thereto (Standing Order 11) to receive the order. The order must be returned, along with an affidavit of due service endorsed thereon, to the Parliament Office within the period granted to the appellant for lodging his printed cases by Standing Order 5, unless within that time all of the respondents have lodged their printed cases. In default, the appeal stands dismissed (Standing Order 3). The affidavit must be sworn before a Justice of the Peace. Service

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[1] *M'Intyre Bros.* v. *M'Gavin*, 1893, 20 R. (H.L.) 49; *Rixon* v. *Edinburgh Northern Tramways Co.*, 1893, 20 R. (H.L.) 53.

[2] *Montgomerie & Co., Ltd.* v. *Wallace-James*, 1903, 6 F. (H.L.) 10, per L. C. Halsbury at p. 11; *Kilpatrick* v. *Dunlop* (H.L.), reported as note to *Murray* v. *Fraser*, 1916 S.C. at p. 631; "*Strathlorne*" *Steamship Co.* v. *Baird & Sons*, 1916 S.C. (H.L.) 134, per L. C. Buckmaster at p. 135; *Clarke* v. *Edinburgh and District Tramways Co.*, 1919 S.C. (H.L.) 36.

[3] For Form, see Appendix to Standing Orders.

is effected by delivery to the respondent or his agent of a copy of the order, the original being at the same time shown to him. It may be made by the agent or his clerk.

998. The order of service, which is granted as a matter of course, stops execution of the judgment appealed against, and all further procedure in the case in the Court below, even although leave to appeal has been refused by the Court of Session.[1] Should the respondent desire to enforce his decree after the order of service has been issued, or obtain interim possession and payment of expenses already incurred, he must apply for leave by petition to the Court whose judgment is under appeal. That Court regulates such matters according to its sound discretion, having a just regard to the interests of the parties, as they may be affected by the affirmance, or reversal of the judgment, or decree, appealed from.[2] As a rule the petition is granted, either *de plano*, or subject to consignation,[3] or delay,[4] unless some good reason to the contrary be adduced.[5] But as nothing short of an order of service stops execution, the appellant cannot refuse to pay the taxed amount of the respondent's expenses in the Court of Session, if these have been awarded, on the ground that he is contemplating an appeal. It is usual, however, in such circumstances for the respondent's agent to grant an undertaking to repay the amount should the judgment be reversed upon that point. If an order of service is desired upon the day of presentation of the appeal, for the purpose of stopping execution, the appeal must be lodged in the Parliament Office not later than one o'clock on that day, accompanied by a letter from the agent stating that the order is desired for the purpose of staying execution. The order of service and affidavit, along with the appellant's case and relative appendix, must be lodged in the Parliament Office within six weeks from the date of presentation of the appeal (Standing Order 5). If such period expires during recess, it is extended to the third sitting day of the next ensuing meeting of the House (Standing Order 7). The time for lodging papers may be further extended upon petition showing reasonable cause (Form, Appendix C).

Subsection (7).—*Security for Costs.*

999. The appellant must give security for costs by granting his own recognisance, or that of a satisfactory substitute, for £500, and by either lodging a bond by two sufficient sureties for £200, or paying that sum into the Security Fund Account of the House of Lords. If within a week of the presentation of the appeal he does not so pay, or submit to the Clerk of the Parliaments the names of the proposed sureties, or,

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[1] Order 19th April 1709 (Macqueen's Appellate Jurisdiction, p. 292): Court of Session Act, 1808 (48 Geo. III. c. 151), s. 17; *Edinburgh Northern Tramways Co.* v. *Mann*, 1891, 19 R. 24.

[2] Court of Session Act, 1808 (48 Geo. III. c. 151), s. 17.

[3] *Duke of Hamilton* v. *Buchanan*, 1878, 5 R. 588.

[4] *Ballachulish Slate Quarries Co.* v. *Grant*, 1903, 5 F. 1105.

[5] *Williamson* v. *Macpherson & Co.*, 1904, 7 F. 231.

if a substitute for the recognisance is proposed, the name of the substitute, the appeal will stand dismissed. Each appellant, if there be more than one, must grant a recognisance ; but it is open to the appellants to present a petition that one of their number may be allowed to enter into the recognisance on behalf of himself and the remaining appellants. The sufficiency of the substitute and sureties must be certified by the appellant's agent (Form of Certificate, Appendix A), and notice of their names and information as to their means must be given by him to the respondent's agent. The sufficiency of the sureties is determined by the Clerk of the Parliaments. The sum consigned is available *pro tanto* in meeting the respondent's costs, should these be awarded to him : if not, it is repaid to the appellant.

Subsection (8).—*Entering Appearance for Respondent—Appeal Committee.*

1000. The solicitors of the respondents who purpose lodging printed cases in answer to the appeal attend at the Parliament Office for the purpose of entering their names in the Appearance Book. Only solicitors who have so entered appearance are entitled to notice of the meeting of the Appeal Committee. The Appeal Committee consists of the Lord Chancellor and the Law Lords—three of them being a quorum ; but there is usually a full attendance. Any objection to the competency of the appeal is stated to this body, and is practically determined by it, although, in point of form, it reports the result of its deliberations to the House. The Committee may allow an appeal to proceed even although leave to appeal has been refused by the Court of Session.[1] If the respondent is to maintain that the appeal is incompetent, he presents a petition to the House praying that it be refused. If the question raised is one of difficulty or general importance, the Committee may reserve the matter for the House.[2] The debate before the Appeal Committee is conducted by the solicitors of the parties, and counsel are not heard unless in very exceptional circumstances.[3]

Subsection (9).—*Lodging Prints.*

1001. The appellant must, within the time fixed by Standing Orders 5 and 7 above narrated, *i.e.* six weeks from the presentation of the appeal, lodge his printed case and relative appendix. Cross-appeals must be lodged within the same time (Standing Order 6). The case must contain a printed copy of the record, as authenticated by the Lord Ordinary, together with a supplement, containing an account, without argument or statement of other facts, of the steps which have been taken in the cause since the record was completed, and contain also copies of the

[1] *Orr Ewing's Trs.* v. *Orr Ewing*, 1885, 13 R. (H.L.) 1 ; *Mann* v. *Edinburgh Northern Tramways Co.*, 1892, 20 R. (H.L.) 7.

[2] *Mackintosh* v. *Lord Advocate*, 1876, 3 R. (H.L.) 34.

[3] Macqueen, Appellate Jurisdiction, 33 ; Denison and Scott, Appeal Practice, 28.

interlocutors, or parts of interlocutors, complained of. Each party must also lay before the House a copy of the case presented by him in the Court of Session, if any such case was presented there, with a short summary of any additional reasons upon which he means to insist; and if no such case was presented in the Court of Session, each party must set forth in his case the reasons upon which he founds his argument, as shortly and succinctly as possible (Standing Order 5). The cases upon each side are signed by one or more counsel who have attended in the Court below, or purpose attending at the hearing of the appeal. The Directions for Agents contain exhaustive details as to printing the appendix.

1002. A respondent can only be heard at the bar upon lodging a printed case. If it is not lodged within the time specified in the order of service (*i.e.* the time fixed by Standing Orders 5 and 7), the appellant may have the case set down for hearing *ex parte*; but the respondent may thereafter lodge his printed case, and this puts him in the same position as if his prints had been timeously lodged. Should he not do so, however, until the case is actually put out for hearing, he requires leave of the House before he can lodge his case and be heard. Where several parties are called as respondents to an appeal, they are required, where possible, to join in one case in answer. Where they do not, the respondents, after the first who lodges his case in answer, must apply, by petition to the House, for leave to appear separately, and must state good reasons in support of their desire. The Directions for Agents contain full details as to the number of copies to be lodged and the order in which the prints must be bound up.

Subsection (10).—*Setting down Cause for Hearing.*

1003. As soon as the printed cases of all parties and the appendix have been lodged, it is optional for either side to set down the cause for hearing, but it is obligatory upon the appellant, upon the lodgment of his printed case and appendix, to set down the cause for hearing within the time limited by Standing Order 5 (*ex parte* as to those respondents who have not already lodged printed cases, upon proof, by affidavit, of the due service of the order of service upon the respondents or their solicitors). A respondent who has lodged his printed case is at liberty to set down the cause for hearing on the first sitting day after the expiration of the time limited by the Standing Order for lodging printed cases. The cause will then be ripe for hearing, and will take its position on the effective cause list. A copy of the record, duly certified by the Clerk of Court, must be lodged with the Purse-Bearer of the Lord Chancellor a few days before the hearing of the appeal. Subject to special direction by the House, the originals of documents contained in the record do not require to be produced at the bar. At the hearing of the cause the appellant's case is opened by his leading counsel, who is, or may be, followed by the appellant's other counsel on the same side;

thereafter the respondent's case is opened by his leading counsel, who may be followed by the other counsel with him. One of the appellant's counsel has the right of reply. The judgment will not be reversed merely because of the absence of the respondent: the appellant must show that it is wrong.

Subsection (11).—*Death or Bankruptcy of a Party.*

1004. Provision is made by Standing Order 8 for revival of the appeal in the case of abatement or defect by reason of the death or bankruptcy of a party. Supplementary cases must be lodged by the party or parties reviving the appeal.

Subsection (12).—*Pauper Appeals.*

1005. Petitions for leave to sue *in forma pauperis* must be lodged for presentation within one week from the date of presentation of the petition of appeal to the House. In default, the petition will stand dismissed, unless the usual security for costs is found within the time limited by the Standing Orders. Forms of pauper petitions and of affidavits and certificates of poverty can be obtained from the Judicial Department. In pursuance of the Appeal (*Forma Pauperis*) Act, 1893, appellants praying for leave to sue *in forma pauperis* are required to establish, to the satisfaction of the Appeal Committee, a *prima facie* case for the appeal; they are also required to lodge in the Judicial Department, as soon as possible after the presentation of the petition, a copy of the proceedings in the Courts below, together with references to the reports, if any, of the cause. The petition is referred by the House to the Appeal Committee for consideration. The applicant must either shew that there has been a difference of judicial opinion in the Courts below, in which case the application is usually granted; or he must convince the Committee that there is a strong probability of the judgment being wrong. This an applicant very rarely succeeds in doing. When a pauper appellant is awarded costs, the fees of the House are now disallowed, and also the fees of counsel, but the solicitor may get his costs out of pocket, with a reasonable allowance to cover office expenses, including clerks, etc. A person who sues for declarator of a public right (*e.g.* of fishing or right-of-way) will not be allowed to prosecute an appeal *in forma pauperis*.[1]

Subsection (13).—*Costs.*

1006. Forms of Bills of Costs in appeal cases may be obtained at the Judicial Office of the House of Lords. The costs of the appeal are taxed by the Taxing Officer of the House. See Expenses.

[1] *Bowie* v. *Marquis of Ailsa*, 1887, 15 R. (H.L.) 114.

SUBSECTION (14).—*Petition to apply Judgment.*

1007. After judgment is pronounced in the appeal, it is usually necessary to apply to the Court of Session to apply the judgment, as judgments in appeals are seldom issued in a form which admits of a decree being extracted. If anything remains to be done, even although it be only to get decree for certified costs,[1] the application is made by petition, and this even though there is no remit from the House.[2] But where, by the judgment of the House, a case was remitted to the Court of Session, and the parties thereafter compromised the action, the Court applied the judgment upon presentation and in terms of a joint minute.[3] The application of the judgment of the House of Lords by the Court of Session is a purely ministerial duty, and the petition is granted *de plano*, although there may be question as to delay if sufficient cause is shown.[4] Where the House simply affirms the judgment and dismisses the appeal, a petition to apply the judgment is unnecessary.[5] Expenses are allowed when the petition is necessary.[6] Where the petition asks for more than the Court grants, and the respondent's appearance is necessary to oppose it, or where there is divided success, expenses are not given.[7]

SECTION 13.—APPEALS IN SMALL DEBT CASES TO HIGH COURT OF JUSTICIARY.

SUBSECTION (1).—*General.*

1008. A limited appellate jurisdiction in matters civil is conferred on the Justiciary Courts by the Heritable Jurisdictions (Scotland) Act, 1746.[8] This has been curtailed by subsequent statutes, and is now in practice confined to judgments pronounced in the Sheriff's Small Debt Court. The Small Debt (Scotland) Act, 1837,[9] which is hereafter spoken of as the "Small Debt Act," confers on the Justiciary Courts (Circuit Courts, or where there are no Circuit Courts, the Court of Justiciary at Edinburgh), an appellate jurisdiction on special grounds, in the manner and by and under the rules, limitations, conditions, and restrictions contained in the Heritable Jurisdictions (Scotland) Act, 1746.

1009. Section 30 of the Small Debt Act provides that no decree decided under that Act "shall be subject to reduction, advocation, suspension, or appeal, or any other form of review or stay of execution, other than provided by this Act, either on account of any omission or irregularity

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[1] *Ferrie* v. *Ferrie*, 1853, 15 D. 766; *Catton* v. *Mackenzie*, 1872, 9 S.L.R. 546.
[2] *Gill* v. *Anderson*, 1859, 21 D. 723.
[3] *Anstruther* v. *Anstruther's Trs.*, 1873, 11 M. 955.
[4] *Free Church General Assembly* v. *Lord Overtoun*, 1904, 7 F. 202.
[5] *Peters* v. *Magistrates of Greenock*, 1893, 20 R. 924.
[6] *Walker* v. *Whitwell*, 1916 S.C. 757.
[7] *Fleeming* v. *Howden*, 1868, 7 M. 79; *Teacher's Trs.* v. *Calder*, 1900, 2 F. 372.
[8] 20 Geo. II. c. 30, s. 34. [9] 7 Will. IV. and 1 Vict. c. 41, s. 31.

or informality in the citation or proceedings, or on the merits, or on any ground or reason whatever." Where, however, the proceedings are fundamentally null, reduction, or suspension may be competent.[1] But if the ground of appeal falls within the provisions of the Small Debt Act the appellant must follow the procedure there laid down.[2] Where the proceedings are founded on a statute which provides for appeal in a particular way, *e.g.* the Friendly Societies Act, 1875, which prescribes appeal by stated case, the provision in the special Act is the operative enactment.[3] The mere circumstance that a Small Debt action has been remitted to the Ordinary Roll does not take away the right of appeal.[4]

SUBSECTION (2).—*Grounds of Appeal.*

1010. The grounds of appeal are given in s. 31 of the Small Debt (Scotland) Act, 1837, which provides that "such appeal shall be competent only when founded on the ground of corruption or malice and oppression on the part of the Sheriff, or on such deviations in point of form from the statutory enactments, as the Court shall think took place wilfully, or have prevented substantial justice from having been done, or on incompetency, including defect of jurisdiction of the Sheriff." It is thus incompetent to review the decision of the Sheriff in Small Debt cases on the merits, or on the allegation that he took a wrong view of the facts, or of the law governing the facts.[5]

SUBSECTION (3).—*Corruption, Malice, and Oppression.*

1011. This ground is not restricted to actual bribery, personal malice, or intentional oppression. It arises where anything has been done by the Sheriff so grossly unjustifiable, or so unfair, as to be legally equivalent to corruption, or malice and oppression.[6] Thus, it is oppression for the Sheriff to act as judge in his own cause ;[7] or unreasonably to refuse to hear evidence after proof allowed,[8] or to grant decree where there is no legal ground of liability.[9] It is *not* oppression, where he proceeds in face of an erroneous citation ;[10] or grants decree in error after he has fairly applied his mind to the facts and law.[11]

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[1] *Murchie* v. *Fairbairn*, 1863, 1 M. 800 ; *Manson* v. *Smith*, 1871, 9 M. 492 ; *Shiell* v. *Mossman*, 1871, 10 M. 58 ; *MacKenzie* v. *Martin*, 1891, 2 White, 589, per L. J. C. Macdonald at p. 595 ; *Christie Brothers* v. *Remington Typewriting Co.* (O.H.) 1912, 1 S.L.T. 123.

[2] *Graham* v. *Mackay*, 1848, 6 Bell's App. 214.

[3] *Linton* v. *City of Glasgow Friendly Society*, 1895, 23 R. 51.

[4] *Campbell* v. *Gillies*, 1871, 2 Coup. 142.

[5] *Wilson* v. *Glasgow Tramways Co.*, 1878, 5 R. 981 ; *Portpatrick Joint Committee* v. *Sprot*, 1899, 2 Adam, 519 ; 25 R. (J.) 71 ; *Millar* v. *Strathmore Auction Co., Ltd.*, 1906, 8 F. 71.

[6] *Phillip* v. *Trustees of Forfar Building Investment Co.*, 1868, 1 Coup. 87 ; *Gordon* v. *Mulholland*, 1891, 2 White, 576, 18 R. (J.) 18 ; *Robson* v. *Menzies*, 1913, 7 Adam, 156 ; 1913 S.C. (J.) 90.

[7] *Flowerdew* v. *Reid*, 1852, 1 Irv. 91.

[8] *Reid & Son* v. *Sinclair Bros.*, 1894, 1 Adam, 500, 22 R. (J.) 12.

[9] *Patrick Henderson & Sons* v. *National Telephone Co., Ltd.*, 1909, 6 Adam, 50 ; 1909 S.C. (J.) 46.

[10] *Atherton* v. *Moffat*, 1843, 1 Broun, 524.

[11] *Smith* v. *Moonie*, 1892, 3 White, 294.

SUBSECTION (4).—*Wilful Deviation.*

1012. This ground arises where the Sheriff has done something, knowing that under the Act he had no right to do it, or has acted in so capricious a manner as to cause grave injustice.[1] It does not arise where, despite small irregularities in procedure, substantial justice has been done.[2] The following have been held to be wilful deviations :— (*a*) Amendment of instance by a radical alteration ; [3] (*b*) decree given for what is *ex facie* inconsistent with account annexed to summons, *e.g.* decree for damages, when account was for goods sold,[4] or the claim was for value of an article,[5] or for rent ; [6] (*c*) account shews no ground for action, and omission has prevented substantial justice being done ; [7] (*d*) improper granting or refusal of a sist and rehearing ; [8] (*e*) not allowing parties a hearing ; [9] admission of clearly incompetent evidence ; [10] or admitting evidence of a counter-claim, or of a defence which is truly a counter-claim, of which notice had not been given ; [11] or refusal to allow a proof [12] or to hear evidence affecting damages [13] or expenses ; [14] (*f*) improper reference to oath,[15] or refusing to allow defender to make a statement in supplement of deposition on oath ; [16] (*g*) dispensing with production of a document which formed the ground of action ; [17] (*h*) failure to inquire into allegation of no contract and no transactions ; [18] (*i*) extract issued before case completely disposed of by Sheriff, *e.g.* expenses not taxed ; [19] (*j*) granting warrant to carry back furniture without taking steps to ascertain the facts ; [20] (*k*) refusal to grant warrant to sell, after decree in sequestration for rent ; [21] or refusal to hear case, merely because Sheriff thought there should be an end of strife between the parties ; [22] (*l*) repelling objection to competency of multiplepoinding when common debtor not cited.[23]

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[1] *Paterson & Sons* v. *Robinson*, 1895, 1 Adam, 576.
[2] *Weatherstone* v. *Gourlay*, 1860, 3 Irv. 589. [3] *Welsh* v. *Semple*, 1894, 1 Adam, 389.
[4] *Glasgow and South-Western Railway Co.* v. *Wilson*, 1855, 2 Irv. 162.
[5] *Singer Manufacturing Co.* v. *Beale & Mactavish*, 1905, 8 F. (J.) 29.
[6] *Mair's Trs.* v. *Miller*, 1908 S.C. (J.) 74.
[7] *Scottish North-Eastern Railway Co.* v. *Mathews*, 1866, 5 Irv. 237.
[8] *Rowan* v. *Mercer*, 1863, 4 Irv. 377 ; *Wyllie* v. *Clowson*, 1863, 4 Irv. 441 ; *Montgomery* v. *Loughran*, 1891, 2 White, 597 ; *M'Neil* v. *M'Neil*, 1891, 3 White, 1 ; *Gow & Sons* v. *M'Ewan*, 1897, 2 Adam, 315 ; *Ratcliffe* v. *Farquharson*, 1908, 16 S.L.T. 33.
[9] *Robson* v. *Menzies*, 1913, 7 Adam, 156 ; 1913 S.C. (J.) 90.
[10] *MacLachlan* v. *Tennant*, 1871, 2 Coup. 45.
[11] *Taylor* v. *Ormond & Co.*, 1906, 8 F. (J.) 76 ; *Rolland* v. *Rolland*, 1907, 5 Adam, 350 ; 44 S.L.R. 770.
[12] *Carmichael* v. *Macintyre*, 1904, 4 Adam, 376 ; 6 F. (J.) 48.
[13] *Cowe* v. *M'Dougall*, 1908, 5 Adam, 616 ; 1909 S.C. (J.) 1.
[14] *Renfrew* v. *Hall*, 1901, 3 Adam, 517 ; 4 F. (J.) 27 ; *Stalker* v. *Somerville*, 1901, 3 Adam, 525 ; 4 F. (J.) 31.
[15] *Gordon* v. *Mulholland*, 1891, 2 White, 576 ; 18 R. (J.) 18.
[16] *Paterson* v. *Cowie's Exr.*, 1904, 4 Adam, 425 ; 7 F. (J.) 68.
[17] *Bell v. Maxwell*, 1886, 1 White, 229. [18] *Bryce* v. *Spence*, 1885, 5 Coup. 624.
[19] *Guthrie* v. *M'William*, 1856, 2 Irv. 476.
[20] *Young* v. *Johnston*, 1890, 2 White, 527.
[21] *Clark* v. *Lowe*, 1900, 3 Adam, 174 ; 2 F. (J.) 49.
[22] *Gow & Sons* v. *M'Ewan*, 1897, 2 Adam, 215.
[23] *Britannic Assurance Co.* v. *James Henderson, Ltd.*, 1912, 6 Adam, 590 ; 1912 S.C. (J.) 31.

1013. The following are *not* wilful deviations :—(*a*) Account annexed does not set forth title to sue, date, or explicit details of ground of action, but omission has caused no substantial injustice ; [1] (*b*) informality in account which does not vitiate instance ; [2] (*c*) alteration of account which does not cause substantial injustice ; [3] (*d*) decree given for a claim which is stated in slump without detail ; [4] (*e*) summons contains no account of origin of cause of action, except by reference to account annexed ; [5] (*f*) rejection of a counter-claim which had not been duly served ; [6] (*g*) cause proceeding without a regular continuation ; [7] (*h*) alleged improper allowance or refusal of proof ; [8] (*i*) granting sists on two separate occasions.[9]

Subsection (5).—*Incompetency.*

1014. This ground arises where an objection is alleged which strikes radically at the competency of the action,[10] or totally excludes the jurisdiction of the Sheriff to try it.[11] Appeal has been allowed on the following grounds :—(*a*) Action for recovery of a statutory penalty raised under Small Debt Act ; [12] (*b*) action raised at wrong instance ; [13] (*c*) ground of action prescribed and unsupported by competent evidence ; but this judgment has been questioned.[14] On the other hand, *no* appeal on this ground was allowed where (*a*) Sheriff said to have misconstrued the Act on which proceedings founded ; [15] (*b*) action raised in Ordinary Small Debt Court instead of Small Debt Circuit Court ; [16] (*c*) pursuer had no title to sue ; [17] and (*d*) where action proceeded with, and decree pronounced, after lapse of year and day.[18]

Subsection (6).—*Procedure.*

1015. The appellant, or his agent, in open Court at the time of the decree, or within ten days thereafter, lodges a minute of appeal with the Sheriff-Clerk, and serves a copy on the respondent, or his agent, the *inducice* being fifteen days. No sist or stay of the process and

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[1] *Bissell* v. *Buchanan*, 1871, 2 Coup. 43.
[2] *Sinclair* v. *Rosa*, 1863, 4 Irv. 390.
[3] *Sturrock* v. *Anton*, 1866, 5 Irv. 234.
[4] *Mowat*, 1856, 2 Irv. 435.
[5] *Aitken* v. *Learmonth*, 1855, 2 Irv. 156.
[6] *Cowie* v. *Rush*, 1866, 5 Irv. 320.
[7] *Flowerdew* v. *Reid*, 1852, 1 Irv. 91.
[8] *Buchanan*, 1862, 4 Irv. 225 ; *Hare* v. *M'Nicol*, 1871, 2 Coup. 40 ; *Paterson* v. *Mackay*, 1872, 2 Coup. 327.
[9] *Grange* v. *MacKenzie*, 1866, 5 Irv. 324.
[10] *Dickie's Trs.* v. *White*, 1871, 44 J. 1.
[11] *Murray* v. *Russell & Co.*, 1892, 3 White, 314 ; *Robson* v. *Menzies*, 1913, 7 Adam, 156 ; 1913 S.C. (J.) 90.
[12] *Grant* v. *Hay*, 1888, 2 White, 6.
[13] *Campbell* v. *Gillies*, 1871, 2 Coup. 142.
[14] *Murray* v. *Mackenzie*, 1869, 1 Coup. 247.
[15] *Mosson* v. *Brash*, 1872, 2 Coup. 325 ; *Allison* v. *Balmain*, 1882, 5 Coup. 137, 10 R. (J.) 12.
[16] *Stewart* v. *M'Gregor & Son*, 1868, 1 Coup. 92.
[17] *Findlay* v. *Crabb*, 1886, 1 White, 110, 13 R. (J.) 53.
[18] *Kean* v. *Lindsay*, 1852, 1 Irv. 88.

decree pronounced under the Small Debt Act, and no certificate of appeal, can be issued by the Sheriff-Clerk, except upon (1) consignation of the whole sum (if any) decerned for by the decree, and the expenses (if any); and (2) security being found for the whole expenses which may be incurred and found due under the appeal.[1] The appeal is heard and determined in open Court.[1] It is not competent (*a*) to produce or found upon any document, as evidence on the merits of the original cause, which was not produced to the Sheriff when the case was heard, and to which his signature or initials were not then affixed; or (*b*) to found upon or refer to the testimony of any witness not examined before the Sheriff, and whose name was not written by him, when the case was heard, upon the record copy of the summons, which he is to do when specially required to that effect.[1]

1016. The Circuit Court have power to correct deviations in point of form, or to remit the cause to the Sheriff, with instructions, or for rehearing generally.[2] Should difficulty arise, the Court certify appeals under the Heritable Jurisdictions Act to the Court of Session.[3] If *per incuriam*, an appeal under that Act is certified to the High Court of Justiciary, that Court will transfer it to the proper tribunal.[4] In appeals under the Small Debt Act, the Circuit Court usually certify to the High Court of Justiciary, who either transfer the appeal to one of the Divisions of the Court of Session,[5] or dispose of it themselves.[6]

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[1] S.D. Act, s. 31.

[2] *Ibid.*; *Glass* v. *Laughlin*, 1876, 3 Coup. 370; *Bryce* v. *Spence*, 1885, 5 Coup. 624; *Bell* v. *Maxwell*, 1886, 1 White, 229.

[3] 20 Geo. II. c. 43, s. 37.

[4] *Cambuslang Road Trs.* v. *Graham*, 1845, 2 Broun, 550.

[5] *Burrell & Son* v. *Foster*, 1868, 1 Coup. 103.

[6] *Allison* v. *Balmain*, 1882, 5 Coup. 137.

APPEAL (CRIMINAL).

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Section 1.—Introduction.

1017. By the law of Scotland there are now five modes whereby the proceedings and judgments of Courts of criminal jurisdiction can be brought under review. These modes are:—

1. Advocation to the High Court of Justiciary;
2. Appeal to the Circuit Court;
3. Appeal by Stated Case;
4. Bill of Suspension; and
5. Appeal under the Criminal Appeal (Scotland) Act, 1926.[1]

This last mode of review is open, in the cases to which the statute applies, from and after 1st November 1926.

1018. In Scotland the Appellate Court in criminal matters is the High Court of Justiciary. Its jurisdiction is in part statutory, and in part the product of the common law. As the supreme criminal Court of Scotland it has an inherent eminent jurisdiction to entertain and determine appeals in criminal causes. All Courts of criminal jurisdiction are subject, in the exercise of their powers, "to the control and superintendence of the Lords of Justiciary."[2] Until the passing of the Criminal Appeal (Scotland) Act, 1926, this jurisdiction was

[1] 16 & 17 Geo. V. c. 15.

[2] Hume, ii. 509.

subject to limitation in two respects: (1) It extended only to appeals from the proceedings of the *inferior* Courts, and (2) it was strictly qualified as regards its character and scope.

The Act of 1926 has introduced far-reaching changes. For the first time in the criminal jurisprudence of Scotland it has made appeal against conviction and sentence competent in causes tried upon indictment in the High Court,[1] whether in Edinburgh or on circuit. It has innovated on the common law as regards suspension, substituting Appeal under the Act for Bill of Suspension and making the latter incompetent in any proceedings upon indictment in the Sheriff Court.[2] It has also effected revolutionary changes in the grounds upon which appeals may be entertained and determined. These topics are fully discussed hereinafter under the head of "Appeal under the Criminal Appeal (Scotland) Act, 1926."

1019. Prior to the passing of the Act of 1926 no appeal was competent in any case triable before a judge of the High Court of Justiciary.[3] To this rule there was a statutory exception. Under the Prevention of Crime Act, 1908,[4] a person sentenced in Scotland to preventive detention may appeal against the sentence to a Court of Appeal which shall consist of not less than three judges of the High Court of Justiciary. This statutory right of appeal is preserved by the Act of 1926.[5] The procedure in such appeals is regulated by Act of Adjournal of 24th June 1909. No appeal is competent from judgments of the Court of Justiciary to the House of Lords.[6] By s. 72 of the Criminal Procedure (Scotland) Act, 1887,[7] all interlocutors and sentences pronounced by the High Court of Justiciary under the authority of the Act are to be final and conclusive, and not subject to review by any Court whatsoever. Certification of a cause for the opinion of the High Court of Justiciary is not a mode of appeal, but is a method whereby questions of difficulty, or general importance, may be remitted for the consideration and authoritative judgment of a larger Court. Reduction is not a competent mode of reviewing, or setting aside, the proceedings or judgment in a criminal cause.[8]

1020. The appellate jurisdiction of the High Court of Justiciary is, apart from the statutory changes introduced by the Act of 1926,[9] also limited as regards its character and scope. The Court has no power to re-try a case, or to adjudicate anew upon its merits, or to allow additional evidence to be led, or, generally, to exercise more than very limited functions as regards review. These original limitations remain in force except in so far as modified by the Act of 1926. That Act, although in form not creating a new Court of Criminal Appeal, has in effect created a new appellate jurisdiction. It enlarges and extends

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[1] 16 & 17 Geo. V. c. 15, s. 1.
[2] *Ibid.*, s. 13.
[3] Hume, ii. 504; Alison, ii. 677; Macdonald, 3rd ed., p. 532.
[4] 8 Edw. VII. c. 59, s. 17 (5).
[5] 16 & 17 Geo. V. c. 15, s. 1.
[6] *Mackintosh* v. *H.M. Advocate*, 1876, 3 R. (H.L.) 34; L.R. 1 App. Cas. 41.
[7] 50 & 51 Vict. c. 35.
[8] Hume, ii. 509.
[9] 16 & 17 Geo. V. c. 15

the grounds upon which appeal may be taken against conviction or sentence of the inferior Courts, and it authorises appeal from judgments of the High Court of Justiciary. This new jurisdiction is discussed hereafter.

1021. Of the five modes of review above mentioned, Advocation and Appeal to the Circuit Court, although still competent, have now little more than an academic interest. They belong more to the history than to the practice of the law. They possess no advantages over the other modes of appeal, and have the disadvantages that attach to obsolete practice. Appeal by Stated Case is competent only in cases of summary procedure. Appeal under the Criminal Appeal (Scotland) Act, 1926, applies only to solemn procedure. Advocation and Appeal to the Circuit Court of Justiciary are applicable to summary and solemn procedure alike, but, as above stated, are virtually obsolete. Appeal by Bill of Suspension was formerly applicable to solemn and summary procedure alike, but from and after 1st November 1926 it is limited to cases of summary procedure only.

1022. These different modes of appeal are not in all cases mutually exclusive. In determining, therefore, the mode of appeal to be adopted, the first question for the practitioner is, whether the trial has taken place under summary or solemn procedure. If the former, he must proceed either by Stated Case or Bill of Suspension (unless recourse is made to the relatively obsolete modes of review). If the latter, he proceeds under the provisions of the new Act. In the former case, the considerations appropriate as between Stated Case and Suspension are more fully discussed under "Stated Case" (*infra*).

Section 2.—Advocation.

Subsection (1).—*History.*

1023. Advocation is one of the older modes by which the proceedings of inferior Courts in criminal matters may be brought under review. Originally it was a process of transfer whereby a remedy was provided for the removal of a cause "from an incompetent, a dilatory, or a partial and suspected judge, or at most in difficult and intricate cases."[1] In its inception it was not used to correct the blunders in point of law or form which the judge fell into in the trial.[2] As the law developed, advocation ceased to be a process of removal and became rather a process of review, whereby judicial errors might be rectified in such cases as was necessary for the ends of justice.

Subsection (2).—*Competency.*

1024. Advocation is still a competent remedy, but in practice is really obsolete. When resorted to, it is properly applicable to causes

[1] Hume, ii. 510. [2] *Ibid.*

where review is sought, either by the prosecutor or the accused, of a judgment pronounced in the preliminary part of a prosecution.[1] Thus it was appropriate where an inferior judge improperly dismissed a complaint as irrelevant,[2] or declined to pronounce judgment,[3] or dismissed a complaint but did not award expenses.[4] Generally it might be used in all cases where the inferior judge refused to allow the case to proceed and brought the proceedings to an end at his own hand when he had no ground in law for doing so.[5] It was a remedy in the case of any fundamental nullity by which the course of justice had been stopped. Although an appropriate method of review where decisions were pronounced in the preliminary part of a prosecution, it could not competently be resorted to except in extreme cases until the cause had reached the stage of final judgment. Thus an interlocutor repelling objections to the relevancy of the libel could not, and cannot now, be competently advocated to the Court of Justiciary.[6] Such a course, even if competent, would be disallowed on the ground of inexpediency.[7] Nor can it be made competent by leave of the inferior judge.[8] Advocation is not a competent remedy for reviewing a judgment or sentence of the inferior Courts upon the merits.

Subsection (3).—*Procedure.*

1025. The procedure is by Bill of Advocation, which any judge can pass, but the final disposal of which must be by the ordinary quorum of three judges.[9] The Bill, to which is annexed a Statement of Facts and Note of Pleas-in-Law, prays for Letters of Advocation and for warrant to transmit the proceedings to the Clerk of Justiciary. In practice the question raised is discussed and decided upon the passed Bill without the necessity of expeding Letters of Advocation. It is unnecessary for the parties to attend during the discussion except in the case of an advocator sentenced to imprisonment and liberated *ad interim* on caution.[10]

Section 3.—Appeal to the Circuit Court.

Subsection (1).—*A Statutory Jurisdiction.*

1026. The Circuit Courts of the High Court of Justiciary have no appellate jurisdiction in criminal matters apart from that conferred by statute. The origin of such jurisdiction[11] is to be found in the Heritable Jurisdictions (Scotland) Act, 1746.[12] By s. 34 of that Act it is enacted that it shall be lawful for any party conceiving himself

[1] Macdonald, 3rd ed., p. 532.
[2] *Earl of Kinnoul* v. *Tod*, 1859, 3 Irv. 501.
[3] *Smith* v. *Kinnoch*, 1848, Ark. 427.
[4] *Prentice & Newbigging* v. *Bathgate*, 1843, 1 Broun, 569.
[5] *Craig* v. *Galt*, 1881, 4 Coup. 541; *Macrae* v. *Cooper*, 1882, 4 Coup. 561.
[6] *Jameson* v. *Lothian*, 1855, 2 Irv. 273.
[7] *Muir* v. *Hart*, 1912, 6 Adam, 601.
[8] *Ibid.*, per Lord Dunedin at p. 628.
[9] Hume, ii. 514; Macdonald, 3rd ed., p. 534.
[10] 38 & 39 Vict. 3. 62, s. 10.
[11] Hume, ii. 516.
[12] 20 Geo. II. c. 43.

aggrieved by any interlocutor, decree, sentence, or judgment of the Sheriff's, or Stewart's Court of any county, shire, or stewartry, or of the Courts of any royal burgh, or burgh of regality, or barony, or of any Court of any baron, or other heritor having such jurisdiction (except in so far as abrogated, or taken away by the Act), where such interlocutor, decree, sentence, or judgment shall be concerning matters criminal, to complain and seek relief against the same by appeal to the next Circuit Court of the circuit where such county, shire, burgh, or barony shall lie, excepting in cases which infer the loss of life or demembration. On such appeal being taken in the manner prescribed by the statute, the judge or judges at such Circuit Court may proceed to cognosce, hear, and determine any such appeal or complaint by the like rules of law and justice as the Court of Justiciary may cognosce and determine in suspension.

1027. The jurisdiction thus created is now virtually obsolete. The Summary Jurisdiction (Scotland) Act, 1908,[1] makes it competent to appeal to, and to bring under the review of, the High Court of Justiciary by Stated Case, *inter alia*, any matter which may be competently reviewed by appeal under the Heritable Jurisdictions (Scotland) Act, 1746. Although the statute (s. 76) expressly saves existing modes of appeal, procedure by Stated Case has advantages which in practice have superseded appeal to the Circuit Court. This method, accordingly, should not be resorted to except in those few cases in which, under the provisions of a Special Act, other modes of review are expressly excluded. That depends upon the terms of the particular statute. But even where the clause in the Special Act expressly excludes other modes of review, a Bill of Suspension is a competent and preferable remedy wherever the cause is taken outwith the Special Act by a fundamental nullity, or there is a clear case of illegality *ab initio*, or of oppression appearing *ex facie* of the proceedings and not specified in the Special Act as a ground of appeal.[2] Where an appellant has alternative remedies and elects to appeal by Stated Case, he is held to have abandoned any other mode of appeal which might otherwise have been open to him.[3]

1028. In addition to the specified Courts from which appeal may be taken as prescribed by s. 34 of the Heritable Jurisdictions (Scotland) Act, 1746, appeals will lie to the Circuit Court from other Courts if so authorised by the terms of particular statutes. It is, however, clearly decided that without express statutory authority no appeal will lie from a Justice of the Peace Court,[4] or from a Dean of Guild Court,[5] or from a Police Court, except in the case of an irregularity patent on the face of the proceedings, or an excess of jurisdiction on the part of the inferior judge.[6]

The appeal may be taken at the instance of the accused person

[1] 8 Edw. VII. c. 65, s. 60.
[2] *Kidger* v. *M'Phee*, 1888, 2 White, 107.
[3] Summary Jurisdiction Act, 1908, s. 69; *Walker* v. *Forbes*, 1895, 1 Adam, 569.
[4] *Maxwell* v. *Stansfield*, 1820, 20 F.C. App. 1.
[5] *Donaldson* v. *Chapman*, 1828, 7 S. 41.
[6] *Burne* v. *Burnett*, 1850, J. Shaw, 373.

against conviction, or of the prosecutor against dismissal of his complaint or acquittal of the accused.[1]

Subsection (2).—*Procedure.*

1029. The statute (s. 34) prescribes the time of taking appeal, the Circuit Court to which the appeal falls to be taken, and the manner of taking the appeal, which must be in writing,[2] although written reasons for the appeal need not be stated.[3] Provision is made for caution (s. 36), and for service of a duplicate of the appeal upon the opposing party (s. 34). If the appeal contains any conclusion against the inferior judge by way of censure or reparation for alleged wilful injustice, oppression, or other malversation, the appellant serves a duplicate upon the judge in like manner and within the same period as upon the adverse party (s. 34). It is, however, improper to call the inferior judge as a respondent.[4] The appeal must narrate or refer to the judgment appealed against with accuracy. Any material error in this respect is fatal.[5]

Subsection (3).—*Interim Liberation.*

1030. The appellant, if imprisoned under the judgment, may obtain interim liberation either by presenting a separate petition to the High Court or by adding a crave to the prayer of the appeal and moving for liberation *ad interim* at a special enrolment.[6] If a *prima facie* case is made out interim liberation will be granted,[7] without prejudice to any question as to the competency of the appeal. The amount of caution is in the discretion of the Court.

Subsection (4).—*Competency of Appeal.*

1031. Objections to competency, if any, must be taken before the Circuit Court, and cannot be heard after certification to the High Court.[8] It is not a good objection to competency that the appellant has obtempered the judgment by going to prison, paying the fine, or otherwise.[9]

Objections to competency have been sustained upon a variety of grounds, *e.g.* that the cause does not fall within the categories of the Heritable Jurisdictions Act, or of a Special Act allowing appeal to the Circuit Court, that the cause belongs to a class for which a special mode of review is provided [10] (*e.g.* Customs and Excise), that no evidence was produced of the existence of a formal judgment of the inferior Court, or that the procedure prescribed by the Heritable Jurisdictions Act

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[1] *Jopp* v. *Pirrie*, 1869, 1 Coup. 240.
[2] *Anderson* v. *Jameson*, 1879, 2 Coup. 359.
[3] *Orrock* v. *Landale*, 1844, 2 Broun, 189.
[4] *Paterson* v. *Scott Moncrieff*, 1895, 1 Adam, 576.
[5] *Murphie* v. *Malcolm*, 1872, 2 Coup. 216.
[6] *Lees* v. *Rae*, 1888, 1 White, 565.
[7] *Pirrie* v. *List*, 1867, 5 Irv. 433.
[8] *Whatman* v. *Ogilvie*, 1854, 1 Irv. 483.
[9] *Russell* v. *Colquhoun*, 1845, 2 Broun, 572; *Bonthrone* v. *Reuton*, 1886, 1 White, 279.
[10] *Mackenzie* v. *Martin*, 1891, 2 White, 589.

has not been correctly followed. It is essential that the ground of appeal should have been stated in the inferior Court.[1]

Similarly a judgment cannot be supported upon a ground of conviction which was not pleaded before the inferior judge (or before the Circuit Court, in a case of certification), and which does not appear *ex facie* of the proceedings to have been a ground upon which the inferior Court proceeded in convicting.[2]

Subsection (5).—*Grounds of Appeal.*

1032. The Heritable Jurisdictions Act contains no limitation of the grounds of appeal, but where the appeal is taken under the provisions of a Special Act, the grounds of review may be limited by the statute to certain categories, in which event an appeal upon any other ground is incompetent. In every case, however, an appeal will lie in respect of anything that amounts to a fundamental nullity, *e.g.* that the inferior judge has exceeded his jurisdiction,[3] or has refused to exercise his jurisdiction,[4] or that there has been malice, or corruption, or gross irregularity in procedure, or generally any conduct on the part of the prosecutor or judge amounting to oppression in the legal sense. Where a conviction or acquittal has proceeded upon an error in law, the Court may entertain and allow the appeal.[5] But an appeal will not lie upon the merits in so far as involving a question of fact unless in special circumstances where there is statutory provision for a record of the evidence being preserved.[6]

Subsection (6).—*Disposal of Appeal.*

1033. The Court have wide powers in disposing of the appeal. They may sustain the appeal, quash the sentence *simpliciter*, and order the refund of any fine, penalty, or expenses paid by the appellant; they may dismiss the appeal, and where necessary grant warrant to apprehend and recommit the appellant to prison; they may remit back to the inferior judge with instructions to amend the complaint, or as to judgment, or to proceed with the trial as the circumstances of the case may require.[7] They may sustain the appeal in part, and in part dismiss the appeal, where parts of the judgment are separable.[8] It is open to the Circuit Court in any case of difficulty, and wherever necessary for the justice of the cause, to certify the appeal for the consideration of the High Court of Justiciary.[9]

1034. The Summary Jurisdiction Act, 1908,[10] has imposed certain limitations upon the powers of the Court as regards the quashing of convictions. These provisions apply to all appeals to the Circuit Court

[1] *Maitland* v. *Neilson*, 1892, 3 White, 298.
[2] *M'Donald* v. *Gordon*, 1868, 1 Coup. 105.
[3] *Rhodes* v. *Ross*, 1870, 1 Coup. 469.
[4] *Mackenzie* v. *M'Dougall*, 1874, 3 Coup. 54.
[5] *Jopp* v. *Pirrie*, 1869, 1 Coup. 240.
[6] *Wright* v. *Bowers*, 1875, 3 Coup. 99.
[7] *Cooper* v. *Tough*, 1874, 2 Coup. 547.
[8] *Snaddon* v. *Spence*, 1862, 4 Irv. 200.
[9] 20 Geo. II. c. 43, s. 37.
[10] 8 Edw. VII. c. 65, s. 75.

in so far as the proceedings appealed from are taken under the Summary Jurisdiction Act.

Section 4.—Appeal by Stated Case.

Subsection (1).—*History.*

1035. Appeal by Stated Case was introduced into the law and practice of Scotland by the Summary Prosecutions Appeals (Scotland) Act, 1875.[1] Under that Act either party to a cause (which was defined as including every proceeding which might be brought under the Summary Procedure Act, 1864,[2] and every other summary proceeding for the prosecution of an offence or recovery of a penalty competent to be taken before an inferior judge) might, if dissatisfied with the judge's determination as erroneous in point of law, appeal thereagainst notwithstanding any statutory provision excluding appeal or review in any manner of way. The appeal was taken in the form of a Case stated by the inferior judge, setting forth the facts and the grounds of his determination for the opinion thereon of the High Court of Justiciary. This Act, together with the Summary Procedure (Scotland) Act, 1864, and the Summary Jurisdiction (Scotland) Act, 1881,[3] is now repealed. Appeal by Stated Case is now regulated by the Summary Jurisdiction (Scotland) Act, 1908,[4] which codifies the law of Scotland anent Summary Procedure and Appeal.

Subsection (2).—*Civil or Criminal.*

1036. Prior to the Summary Jurisdiction Act, 1908, questions of difficulty arose as to whether a cause was to be deemed to be civil or criminal for purposes of appeal.[5] This difficulty has now been removed. It is provided (s. 4) that the Act, so far as relating to summary procedure, shall apply to summary proceedings in respect of (*a*) any offence which might prior to the passing of the Act, or which may under the provisions of this or any future Act, be tried in a summary manner; (*b*) any offence or the recovery of a penalty under any statute which does not exclude summary procedure; (*c*) any order *ad factum præstandum*, or other order of Court, or warrant competent to a Court of summary criminal jurisdiction; and shall apply to procedure in all Courts of summary criminal jurisdiction in so far as they have jurisdiction in the matters aforesaid. Where any statute provides for appeal under the Summary Prosecutions Appeals (Scotland) Act, 1875,[6] such appeal shall be taken under the Act of 1908. By s. 60 of the Act, appeal shall lie on the final determination of any cause, and "cause" is defined (s. 2) as meaning and including every proceeding brought under this Act.

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[1] 38 & 39 Vict. c. 62 (repealed).
[2] 27 & 28 Vict. c. 53 (repealed).
[3] 44 & 45 Vict. c. 33 (repealed).
[4] 8 Edw. VII. c. 65.
[5] E.g. *North British Rly. Co.* v. *Dumbarton Harbour Board*, 1899, 3 Adam, 121.
[6] 38 & 39 Vict. c. 62 (repealed).

SUBSECTION (3).—*Matters Appealable.*

1037. The substantive provision of the Act regulating appeals is contained in s. 60. On the final determination of any cause, either party to the cause may, notwithstanding any provision in any statute excluding review, make application to the Court to state a case for the opinion of the High Court, and on such application being made the Court, subject to the conditions thereinafter mentioned, shall be bound to state a case for such opinion, and it shall thereupon be competent to appeal to, and to bring under the review of, the High Court by Stated Case:—

1. The relevancy of the complaint;
2. An irregularity in procedure;
3. Any alleged error of the Court in point of law; and
4. Generally any matter which may at present be competently reviewed by suspension, advocation, or appeal under the Heritable Jurisdictions (Scotland) Act, 1746, or otherwise.

SUBSECTION (4).—*Other Modes of Appeal.*

1038. The statute (s. 76) expressly saves existing modes of appeal. The provisions regulating appeal in the Act are declared to be without prejudice to any other mode of appeal competent. For practical purposes Appeal to the Circuit Court and Advocation may, unless no other mode of appeal be open, be regarded as obsolete. The practitioner, accordingly, has to choose whether to proceed by Bill of Suspension or by Stated Case. In making that choice it may be laid down as a good working rule that where it is sought to raise a question of law, either upon the complaint, or upon the facts found proved, Stated Case is the more appropriate form of review. Where, however, the ground of appeal is something extraneous to the complaint or the facts, or something involving criticism of or attack upon the judicial conduct of the proceedings, as, *e.g.*, that the inferior judge has acted oppressively, so that the chance of redress may turn upon the way in which the appeal is stated, the preferable course is to proceed by way of Bill of Suspension (*q.v. infra*). Where the ground of appeal is something amounting to a fundamental nullity, Suspension is the appropriate process of review.[1]

SUBSECTION (5).—*Questions Appropriate.*

1039. Stated Case is the appropriate mode of review where the facts are not instructed either by the complaint or the conviction.[2]

It should be resorted to where the question of the appeal is whether there was legal evidence upon which the inferior judge could find a conviction,[3] or whether upon the facts adduced in evidence, and found

[1] *Morison* v. *Peters*, 1909, 6 Adam, 73. Cp. *Mitchell* v. *Morrison*, 1908, 5 Adam, 545.
[2] *Glass* v. *Linton*, 1882, 5 Coup. 160.
[3] *Fraser* v. *Anderson*, 1899, 2 Adam, 705; *Campbell* v. *Jameson*, 1877, 3 Coup. 391.

proved, the judge ought to have found a conviction. Appeal is competent against an acquittal as against a conviction.[1] It is open to either party to the cause (s. 60). Where the complaint libels the contravention of a statute, and the question is whether the facts proved in evidence amount to a contravention, this mode of appeal should be used.[2] A question whether a conviction is bad as being a general conviction upon alternative charges can be competently raised and decided by Stated Case.[3] Appeals from the decisions of inferior magistrates in prosecutions under the Revenue Acts are competent by Stated Case [4] (ss. 4 and 60). This mode is appropriate where the inferior judge is alleged to have misdirected himself in law [5] or to have refused to admit competent evidence.[6] But where the question is one of fact, and not of law, the Court will not review the decision of the inferior judge.[7]

1040. Generally speaking, under a Bill of Suspension the objections which can be pleaded against a conviction are those which appear on the face of the proceedings, or which affect the conduct of the prosecutor or the judge. On the other hand, where the judge's conclusion upon evidence is being impugned, either on the ground of insufficiency in the sense that there was not legal evidence to warrant his conclusion, or on the ground of misdirection in law, it is more appropriate that the facts raising the question should not be contained in an *ex parte* statement of the appellant, but should be settled by the judge and embodied in a Stated Case.

Subsection (6).—*What Findings Reviewable.*

1041. Findings in fact are not reviewable unless the finding is in substance a finding of mixed fact and law, in which case it is reviewable in so far as it relates to law and not to fact. Where the conclusion reached by the inferior judge has proceeded upon misdirection as to the true state of the law, so that it appears that the judge has misconceived the question to be tried, or the legal principles applicable to the case, an appeal will lie.

It is immaterial to the competency of the appeal, and to the power of the Court, to interfere with the conviction or acquittal appealed from, that the decision of the inferior judge is in form a finding of fact.[8] The Court will look beyond the form of the finding to the real nature of the question which is sought to be raised by the appeal.

1042. While the Court will deal with a case raising a question of the sufficiency of evidence, or error in law, it will not interfere merely on the ground that in the opinion of the Court the inferior judge ought to

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[1] *Waugh* v. *Campbell*, 1920 S.C. (J.) 1.
[2] *Rattray* v. *White*, 1891, 3 White, 89.
[3] *M'Culloch* v. *Rae*, 1915, 7 Adam, 602.
[4] *Schulze* v. *Steele*, 1890, 2 White, 449.
[5] *Waugh* v. *Campbell*, *supra*.
[6] *Thomson* v. *Wilson*, 1900, 3 Adam, 195; *Falconer* v. *Brown*, 1893, 1 Adam, 96.
[7] *Colt* v. *Webb*, 1898, 2 Adam, 591; *Motion* v. *M'Fall*, 1899, 3 Adam, 21; *Gillies* v. *Quigley*, 1905, 4 Adam, 601.
[8] *Davidson* v. *M'Leod*, 1877, 3 Coup. 511, per Lord Young at p. 527.

have reached a different conclusion in fact, or should have exercised his discretion in another way. The conviction or acquittal will stand so long as the inferior judge might find as he did, without violation of established principles of law or justice, if it appears that he has truly applied his mind to the real question to be decided. A question as to the existence or non-existence of fraudulent intent is a question of fact upon which, given legal evidence, the decision of the inferior judge is final.[1]

SUBSECTION (7).—*Limitations of Appeal.*

1043. Any objection to the competency of the appeal should be stated *in limine*, and not after the merits have been opened on.[2] The question to be decided should be raised in the Stated Case, and not for the first time at the hearing of the appeal.[3] It is not competent to raise on the appeal a question not raised before the inferior judge.[4] This rule, however, is subject to qualification. An objection *ex facie* of the proceedings may be entertained.[5] Where the proceedings amount to a fundamental nullity (as, for example, where the complaint does not libel any crime or statutory offence known to the law of Scotland), the question may be raised upon appeal at any stage, although the matter has neither been raised in the Stated Case nor pleaded in the inferior Court.[6] This is so, notwithstanding the provisions of s. 75, which enacts that no conviction, sentence, judgment, order of Court, or other proceeding whatsoever under the Act shall be quashed for want of form, or, where the accused was represented by a law agent, shall be suspended or set aside in respect of any objection to the relevancy of the complaint, or to the want of specification therein, or to the competency, or admission, or rejection of evidence at the trial in the inferior Court, unless such objections shall have been timeously stated at such trial by the law agent of the accused; and subject to the provisions contained in ss. 60 and 72 of the Act, no conviction, sentence, judgment, order of Court, or other proceeding whatsoever shall in any event be quashed unless on the ground of incompetency, or corruption, or malice, or oppression, or unless the High Court shall be of opinion that the accused has been misled as to the true nature of the charge against him, or been prejudiced in his defence on the merits, and that a miscarriage of justice has resulted thereby; provided always that the High Court may amend any conviction, sentence, judgment, order of Court, or other proceeding, or may pronounce such other sentence, judgment, or order as they shall deem expedient.

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[1] *Brander* v. *Buttercup Dairy Co.*, 1921 S.C. (J.) 19.
[2] *Thom* v. *Caledonian Rly. Co.*, 1886, 1 White, 248, per Lord Young at p. 255.
[3] *MacDougall* v. *Maclullich*, 1887, 1 White, 328, per Lord Young at p. 331.
[4] *Martin* v. *Beattie*, 1897, 2 Adam, 222.
[5] *Lang* v. *Walker*, 1909, 6 Adam, 180.
[6] *Hastie* v. *Macdonald*, 1894, 1 Adam, 505, per Lord Justice-Clerk (Macdonald) at p. 508; *O'Malley* v. *Strathern*, 1920, J.C. 74, per Lord Justice-General (Clyde) at p. 79; *Rogers* v. *Howman*, 1918, J.C. 88.

SUBSECTION (8).—*Procedure.*

1044. Application for a case must be made at the time when judgment is given, or at any time within five days thereafter, and shall be signed by the appellant or his agent, and either written on the complaint, or lodged with the Clerk of Court (s. 61). If the inferior judge refuses to state a case upon a question decided by him, and competent to be appealed, the High Court can, on a note presented, order that the case be stated.[1] The application for an order to state should be accompanied by a certificate of refusal of the inferior judge.[2] Immediately on such appeal being taken, the Court fixes a sum to be consigned by the appellant, or for which caution is to be found, to meet any penalty and expenses imposed and the expenses of the appeal, and the appellant is not entitled to have a case stated unless within five days after the date of his appeal he has made consignation, or found such caution to the satisfaction of the Clerk of Court, and has also paid the clerk his fee for preparing the case. The inferior Court, however, may, if it deems it expedient, dispense with consignation or the finding of caution. A person prosecuting in the public interest is not bound to make consignation or to find caution (*ibid.*).

1045. The Court may grant interim liberation (s. 63) on such condition as to caution or otherwise as the Court may fix, and may grant a sist of execution, or may dispense with further consignation or caution, or may make any other interim order which the justice of the case may require, or may refuse to grant interim liberation. An appeal lies against a refusal of liberation, or on the amount of caution, if the appellant is dissatisfied (*ibid.*), and must be taken within twenty-four hours, and in respect of it no fees or expenses are exigible.[3] The appeal may be disposed of by the High Court or any judge thereof, either in court or in chambers.

1046. The Stated Case is prepared in draft by the Clerk of Court (s. 64). It is thereafter sent to the appellant or his agent, and a duplicate thereof to the respondent or his agent. It should be in statutory form. It sets forth the particulars of any matters competent for review which the appellant desires to appeal, and of the facts, if any, proved in the case, and any point of law decided and the grounds of the decision (*ibid.*). After adjustment (s. 65) the case, on signature by the inferior judge, is transmitted to the Clerk of Justiciary, together with the whole proceedings in the cause, including the Notes of Evidence, if any (s. 66). Notice of the appeal is made to the respondent (s. 67). The appellant may abandon the appeal at any time prior to lodging the case with the Clerk of Justiciary, without prejudice to any other mode of review (s. 68), but on the case being lodged with the Clerk of Justiciary the appellant is held to have abandoned any other mode of appeal which

[1] *Martin* v. *Beattie*, 1897, 2 Adam, 222. See also *Ross* v. *M'Leod*, 1891, 3 White, 63.
[2] *Walker* v. *Hunter*, 1903, 4 Adam, 73, per Lord Adam at p. 81.
[3] Act of Adjournal, March 20, 1909.

might otherwise have been open to him (s. 69).[1] The steps of procedure in the appeal are recorded by the Clerk of Court (s. 70). In computing the days of appeal, Sundays and public holidays are excluded (s. 71).

Subsection (9).—*Hearing of Appeal.*

1047. The High Court fixes the date for the hearing and has power to affirm, reverse, or amend the determination of the inferior Court, or to impose a fine instead of imprisonment where imprisonment has been awarded, or to reduce the period of imprisonment, or to reduce any fine imposed by the inferior Court, or to remit the case back to the inferior Court to be amended, and thereafter, on the case being amended and returned, to deliver judgment thereon, or to remit the case to the inferior Court with their opinion thereon. Where an appeal against an acquittal is sustained, the High Court may either convict and sentence the accused, or may remit the case to the inferior Court with instructions to convict and sentence the accused, who shall be bound to attend any diet fixed by such Court for this purpose. It is competent to the High Court to remit to any fit person to inquire and report in regard to the facts and circumstances of any cause under appeal, and on considering such report to pronounce judgment.

1048. In all cases in which interim liberation has been granted, the appellant must appear personally in Court on the day or days fixed for the hearing of his appeal, failing which, unless the Court shall, on cause shewn, permit the appeal to be heard, he shall be held to have abandoned the appeal, and in the event of the appeal being dismissed or refused in whole or in part, the Court is empowered to grant warrant to apprehend and imprison such person for any term not exceeding the unexpired term of imprisonment specified in the sentence under review (s. 72). The prosecutor may consent to the conviction and sentence being set aside either in whole or in part (s. 73).

Subsection (10).—*Expenses.*

1049. The High Court has power to award expenses both in the High and inferior Courts as they may think fit (s. 72). In practice expenses are modified at a fixed amount, ranging from seven to ten guineas. Full expenses are rarely awarded, and only in exceptional cases. The Court has power to direct that the expenses incurred by any prosecutor be paid out of the penalty imposed (s. 52). Where a statute authorises expenses to be given against an accused person, the Court may award expenses against the prosecutor where the accused is the successful party.[2]

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[1] Cp. *Kay* v. *Local Authority of Kelso*, 1876, 3 Coup. 305.

[2] *Walker* v. *Bathgate*, 1873, 2 Coup. 460 ; *Todrick* v. *Wilson*, 1891, 3 White, 28.

Section 5.—Bill of Suspension.

Subsection (1).—*History.*

1050. Suspension, like advocation, is one of the older forms of review. "Like process of advocation it took place formerly under the warrant of a Bill passed by the Lords of Session; in virtue whereof Letters of Suspension were raised, calling the prosecutor to answer at a certain diet and justify the sentence." [1] This practice of presenting a Bill to the Lords of Session was in use until the year 1729, when a Bill of Suspension of a sentence of the Steward of Kirkcudbright presented to the Lords of Session was refused as incompetent, the Lords "reserving to the complainer his course of relief in the proper quarter." In pursuance of this reservation a new Bill was offered to the Lords of Justiciary, who passed it and afterwards suspended *simpliciter* the judgment of the Steward.[1] After that time this process became a part of the ordinary practice of review in criminal matters.

Subsection (2).—*Competency.*

1051. Suspension is a common law process which "applies after conclusion of a trial in the inferior Court to prevent execution of the sentence." [1] It is the procedure whereby an illegal warrant or a bad conviction may be got rid of.[2] It is only competent against an existing warrant or conviction. This warrant or conviction must be truly in existence, otherwise there is nothing to suspend. Thus where a sentence of fine was imposed, and the fine paid but no sentence signed, suspension was held incompetent.[3] Also where a notice was given to do a certain act, and a statute empowered the Commissioners of Police to raise a complaint on failure, it was held incompetent to suspend the notice.[4] Suspension is not competent where the proceedings are not of a criminal nature,[5] or where the Court of review appointed by a statute is a civil Court.[6] But this limitation does not apply to cases of a civil nature over which the Court of Justiciary has original jurisdiction by statute.[7]

1052. Suspension is not a competent process to obtain redress in a case where a person has been illegally detained, unless this has been done under a decree of Court, nor is it a competent process to secure the release of a person who has been apprehended without a warrant. In these and such cases redress would be by an appeal to the *nobile officium* of the Justiciary Court. The High Court has, as the supreme Court in criminal matters, an inherent power of interfering in extraordinary

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[1] Hume, ii. 513. [2] Macdonald, 3rd ed., p. 533. [3] *Jupp* v. *Dunbar*, 1863, 4 Irv. 355.
[4] *Lowson* v. *Police Commrs. of Forfar*, 1877, 3 Coup. 433.
[5] *Campbell* v. *Strathearn*, 1847, Ark. 386; *M'Donald* v. *Gray*, 1844, 2 Broun, 107; *Addison* v. *Stevenson*, 1848, Ark. 505; *Dunlop* v. *Hart*, 1835, 13 S. 1173; *Sommerville* v. *Hemmans*, 1844, 2 Broun, 220; *Park* v. *Earl of Stair*, 1852, J. Shaw, 532.
[6] *Macnaughton* v. *Maddever*, 1884, 5 Coup. 509.
[7] *Giles* v. *Baxter*, 1849, J. Shaw, 203.

circumstances, for the purpose of preventing injustice or oppression.[1] But that fundamental jurisdiction does not reside in a single Lord Commissioner, but only in a quorum of the High Court.[2] Again, before a suspension can be brought the warrant must have been executed, as suspension of a threatened or expected warrant is incompetent;[3] so also where the granting of a warrant has been signified but the warrant itself not signed. Where, however, there is a warrant or other signed determination of a judge, suspension is a competent process of review. It may also happen that the warrant, such as a warrant to imprison, has been wrongly obtained. In such circumstances the suspender, in addition to obtaining redress in the High Court, may have his remedy in the civil Courts.[4]

1053. Suspension only suspends the proceedings of inferior Courts. The proceedings of the High Court of Justiciary can only be dealt with under the Criminal Appeal (Scotland) Act, 1926.[5] Even in causes in the Sheriff Court, suspension is not competent against any conviction, sentence, judgment, or order pronounced after the thirty-first day of October 1926 *in any proceedings on indictment* in the Sheriff Court.[6] After said date the remedy in such causes must be sought by way of appeal under the statute. Also suspension is only applicable to final judgments or determinations—advocation when competent or allowed being the appropriate remedy for correcting errors committed during the course of a trial.[7] After a trial is finished, however, or a conviction has been obtained, a suspension may competently open up the prior proceedings, and their regularity can be inquired into. What is sought to be suspended is usually the sentence or the conviction, but any independent determination or warrant can be suspended. Thus Search Warrants can be suspended.[8] It is also thought that incidental applications under s. 17 of the Summary Jurisdiction Act, 1908[9] (as, *e.g.*, a warrant to break open a lockfast place), which cannot be reviewed by Stated Case under s. 60, can on competent grounds be suspended. Suspension, from the nature of the remedy, is only competent at the instance of an accused party. A suspension is not incompetent because the judgment, or order, sought to be suspended has been executed or obtempered.[10] The object of a suspension is not merely to secure to the suspender freedom from fine or imprisonment, but to rescind and annul the unlawful proceedings.

1054. Suspension is not incompetent even although another mode of review be provided. As a mode of review it is expressly saved

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[1] Moncrieff, Review in Criminal Cases, c. v.

[2] *H.M. Advocate* v. *Lowson*, 1909, 6 Adam, 118.

[3] *Jupp* v. *Dunbar*, *supra*.

[4] *Sinclair* v. *H.M. Advocate*, 1890, 2 White, 481; *M'Hattie* v. *Outram*, 1892, 3 White, 289; *Leask* v. *Burt*, 1893, 21 R. 32; *Coutts & Park* v. *Macbrayne, Ltd.*, 1910 S.C. 386.

[5] 16 & 17 Geo. V. c. 15; see *infra*, para. 1063 *et seqq.*

[6] *Ibid.*, s. 13.

[7] Hume, ii. 509; *Muir* v. *Hart*, 1912, 6 Adam, 601.

[8] *Bell* v. *Black*, 1865, 5 Irv. 57.

[9] 8 Edw. VII. c. 65.

[10] *Bell* v. *Black*, *supra*; *Russell* v. *Colquhoun*, 1845, 2 Broun, 572; *Bonthrone* v. *Renton*, 1886, 1 White, 279.

by s. 76 of the Summary Jurisdiction Act, 1908.[1] If, however, the mode of review is limited by statute, the mode of review provided or an appeal by Stated Case are the only competent modes, and a Bill of Suspension will be refused.[2] But the High Court has an inherent power, notwithstanding a finality clause excluding review, to entertain a suspension in the case of anything amounting to a fundamental nullity in the proceedings of the inferior Courts.[3] And this is so even although another mode of review be provided.[4]

1055. A suspension should be timeously brought. Thus where the ground of suspension alleged was a defect in the form of proceedings in the inferior Court, a delay of nine months was held to be fatal.[5] On the other hand, a delay of four and a half years before bringing a suspension has been held insufficient to exclude the remedy.[6] The case, however, was exceptional, the sentence not setting forth whether the suspender was guilty or not guilty. The question whether a suspension can be brought after delay is always a question of circumstances and of discretion.[7]

Subsection (3).—*Limitations of Suspension.*

1056. A suspension must in every case set forth relevant grounds upon which the sentence, conviction, or other warrant, can be challenged. But it is a well-settled rule that the merits of a conviction cannot be reviewed in a process of suspension either where the inferior judge has erred in point of law or has wrongly decided a case in point of fact. Thus "if the verdict is challenged on this ground only, that it is not warranted by the evidence in the trial, certainly the Lords shall pay no regard to such a plea. To settle the fact is the peculiar province of every assize in what Court soever the trial be; and in the process of review, equally as in receiving a verdict of assize in their own Court, the Lords of Justiciary must in that respect take the face of the verdict for their rule and hold it to be the truth. This doctrine must, however, be received under one provision,—that the evidence laid before the assize is lawful evidence and taken in a lawful manner. For if the inferior judge have admitted material witnesses to whom lawful objections were proposed, or have suffered depositions to be produced to the inquest which were not taken in their presence, or have improperly circumscribed the panel in his proof or the like; these things

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[1] 8 Edw. VII. c. 65.

[2] *O'Brien* v. *M'Phee*, 1880, 4 Coup. 375.

[3] *Massey* v. *Lamb*, 1906, 5 Adam, 59; *Morrison* v. *Peters*, 1909, 6 Adam, 73; *Mitchell* v. *Morrison*, 1908, 5 Adam, 545; *Mahon* v. *Martin*, 1856, 2 Irv. 383; *Collins* v. *Lang*, 1887, 1 White, 482; *Bell* v. *M'Phee*, 1883, 5 Coup. 312; *Mackenzie* v. *M'Phee*, 1889, 2 White, 188; *M'Arthur* v. *Campbell*, 1896, 2 Adam, 151; *Kelly* v. *Rowan*, 1897, 2 Adam, 357; *Craig* v. *Tarras*, 1897, 2 Adam, 344; *Reid* v. *Neilson*, 1898, 2 Adam, 546; *Gray* v. *M'Gill*, 1858, 3 Irv. 29.

[4] *Schulze* v. *Steele*, 1890, 2 White, 449.

[5] *Muirhead* v. *M'Intosh*, 1890, 2 White, 473.

[6] *White* v. *Jeans*, 1911, 6 Adam, 489. See also *Adams* v. *Mackenna*, 1906, 5 Adam, 106; *M'Lure* v. *Douglas*, 1872, 2 Coup. 177.

[7] *Watson* v. *Scott*, 1898, 2 Adam, 501.

shall certainly have their weight against the verdict." [1] This rule and exception are both well settled. Thus a suspension on the ground that bad law had been laid down by a Sheriff in a charge to a jury was refused as incompetent.[2] On the other hand, if incompetent evidence be admitted,[3] or competent evidence be rejected,[4] the verdict can be suspended. Similar considerations apply where the inferior judge has wrongly decided a case in point of fact.[5] It being the province of the inferior judge to determine the question of fact, the High Court will not inquire concerning the sufficiency of the evidence to warrant his conclusion or the wisdom of his judgment upon the evidence led.

1057. Suspensions are subject to the qualifying condition that in all proceedings brought under the Summary Jurisdiction (Scotland) Act, 1908, no conviction, sentence, judgment, order of Court, or other proceeding whatsoever under the Act shall be quashed unless on the ground of incompetence, or corruption, or malice, or oppression, or unless the High Court shall be of opinion that the accused has been misled as to the true nature of the charge against him, or been prejudiced in his defence on the merits, and that a miscarriage of justice has resulted thereby. Further, in proceedings under that statute, no conviction shall be quashed for want of form, or, where the accused was represented by a law agent, shall be suspended or set aside in respect of any objections to the relevancy of the complaint, or to the want of specification therein, or to the competence, or admission, or rejection of evidence at the trial in the inferior Court, unless such objections shall have been timeously stated at such trial by the law agent of the accused.[6]

Subsection (4).—*Grounds of Suspension.*

1058. Suspensions have been sustained on a variety of grounds:—No jurisdiction;[7] bad instance of the complaint, as, *e.g.*, no title to prosecute;[8] irregular citation of the accused;[9] objections to the competency of the complaint;[10] objections to the relevancy of the complaint;[11] rejection of competent evidence;[12] admission of incompetent evidence;[13] refusal of competent questions;[14] oppression[15] on the part of the presiding judge, or of the prosecutor; objections to the conviction, such as that the charge is alternative and the conviction is

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[1] Hume, ii. 514.
[2] *Quarns* v. *Hart*, 1866, 5 Irv. 251.
[3] *Burns* v. *Hart*, 1856, 2 Irv. 571.
[4] *Priteca* v. *H.M. Advocate*, 1906, 5 Adam, 79.
[5] *Dunn* v. *Mitchell*, 1910, 6 Adam, 365.
[6] 8 Edw. VII. c. 65, s. 75.
[7] *M'Pherson* v. *Boyd*, 1907, 5 Adam, 247.
[8] *Duke of Bedford* v. *Kerr*, 1893, 3 White, 493.
[9] *Stewart* v. *Lang*, 1894, 1 Adam, 493; *Dunlop* v. *Goudie*, 1895, 1 Adam, 554.
[10] See *Clark & Bendall* v. *Stuart*, 1886, 13 R. (J.) 86.
[11] *Adams* v. *Mackenna*, 1906, 5 Adam, 106; *Smith* v. *Sempill*, 1910, 6 Adam, 348.
[12] *Priteca* v. *H.M. Advocate*, *supra*.
[13] *Burns* v. *Hart*, *supra*; *Stevenson* v. *Scott*, 1854, 1 Irv. 603.
[14] *Falconer* v. *Brown*, 1893, 1 Adam, 96.
[15] *Mackenzie* v. *M'Phee*, 1889, 2 White, 188; *Kelly* v. *Mitchell*, 1907, 5 Adam, 268.

general,[1] or that the conviction is ambiguous in its terms,[2] or that the sentence has been altered [3] in the record after being pronounced, or that the date of sentence has been altered; [4] that the proceedings are *funditus* null; in jury trials that there has been grave irregularity in procedure,[5] or that the verdict did not amount to the offence libelled.[6] The remedy of suspension is no longer open in the last-mentioned cases. Verdicts of juries in cases triable on indictment can now only be reviewed by appeal under the Criminal Appeal (Scotland) Act, 1926.

SUBSECTION (5).—*Procedure.*

1059. There is no statutory form for a Bill of Suspension or Bill of Suspension and Liberation where a sentence of imprisonment has been passed; but forms modelled on the forms annexed to the Act of Sederunt, 12th December 1838, are usually used.[7] The Bill is signed either by counsel or agent. One judge alone can grant the preliminary deliverances, including granting interim liberation, but a *quorum* of the Court is required to dispose of the Bill itself.[8] In practice the Court disposes of the suspension by the interlocutor passing or refusing the Bill. It may remit to the Sheriff to inquire and report regarding any matter where essential to the due determination of the appeal. It can award expenses both in the High and inferior Courts. There ought always to be a respondent in a process of suspension, and the proper respondent is the prosecutor. But it may happen there is no prosecutor, as in the case of a suspension of a sentence of imprisonment for contempt of Court. In such cases the Court will consider the Bill even if there be no respondent.[9]

SUBSECTION (6).—*Interim Liberation.*

1060. Where the sentence appealed from is a sentence of imprisonment and the appellant is in custody, it is usual to include in the Bill a crave to grant liberation *ad interim*. This application may be dealt with by a single judge, who decides the question upon a *prima facie* view of the case. The grant or the refusal of the application is discretionary, but if it appears from the Statement of Facts annexed to the Bill that there is a question for appeal, and that the appeal is not frivolous, or merely dilatory, the almost invariable practice is to grant the application. It is subject to such conditions as to caution or bail as the judge who grants it may impose.

1061. Where interim liberation is granted, the appellant must appear and be present at the hearing of the suspension. Should he fail to do so,

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[1] *Reaney* v. *Maddever*, 1883, 5 Coup. 367.
[2] *Masterman* v. *Middleton*, 1901, 3 Adam, 353.
[3] *M'Rory* v. *Findlay*, 1910, 6 Adam, 417. [4] *Smith* v. *Sempill*, 1910, 6 Adam, 348.
[5] *M'Garth* v. *Wingate*, 1869, 1 Coup. 260. [6] *Milne* v. *Simpson*, 1874, 2 Coup. 562.
[7] See Juridical Styles, iii. 896–900. [8] Hume, ii. 514; Macdonald, 3rd. ed., 534.
[9] See *Macleod* v. *Speirs*, 1884, 11 R. (J.) 26; *Nicolson* v. *Linton*, 1861, 4 Irv. 115.

or should the appeal be abandoned, and he fail voluntarily to surrender to his gaolers, a warrant for his apprehension and imprisonment for such remaining period of his sentence as is unexpired will be granted.

1062. The Crown may be heard to oppose interim liberation on any ground of public interest or policy such as would justify opposition to an application for bail. But a substantial ground of refusal must be alleged and instructed.

Section 6.—Criminal Appeal (Scotland) Act, 1926.[1]

Subsection (1).—*Scope of Act.*

1063. This Act amends the law of Scotland relating to appeal in criminal cases tried on indictment. It has no application to summary trials or to appeals competent therein whether by way of Stated Case, Suspension, or other mode of review. It introduces for the first time into the law and practice of Scotland appeal from a single judge sitting as the High Court of Justiciary in causes triable upon indictment to the High Court of Justiciary as an appellate tribunal. The Act does not, unlike the Criminal Appeal (England) Act, 1908, constitute a Court of Criminal Appeal for Scotland as a separate Court distinct from the High Court of Justiciary. But it so extends the jurisdiction of the High Court as virtually to create a new appellate jurisdiction analogous to the Court of Criminal Appeal in England.

1064. The situation created by the new Act presents a curious anomaly. Under the Criminal Procedure Act, 1887,[2] a single judge of the High Court sitting in a criminal cause is deemed to be the High Court of Justiciary. The effect of the statute is, accordingly, to create a right of appeal from the High Court of Justiciary to itself as an appellate Court. This anomaly, however, although theoretically indefensible, should give rise to no practical difficulty. The judge of the Court of first instance will not be one of the judges constituting the appellate tribunal. It might, however, have been more satisfactory, at any rate from the point of view of the records of the Court, if an entirely new Court independent of the High Court of Justiciary had been constituted by the Act.

Subsection (2).—*Right and Conditions of Appeal.*

1065. The right of appeal by persons convicted on indictment is contained in s. 1 of the Act. That section provides that a person convicted on indictment may appeal under the Act to the High Court of Justiciary (thereinafter in the Act referred to as the Court):—

(*a*) against his conviction, on any ground of appeal which involves a question of law alone; and

(*b*) with the leave of the Court, or upon the certificate of the judge who presided at the trial that it is a fit case for appeal, against his conviction, on any ground of appeal which involves a ques-

[1] 16 & 17 Geo. V. c. 15. [2] 50 & 51 Vict. c. 35.

tion of fact alone or a question of mixed law and fact, or on any other ground which appears to the Court or to the judge to be a sufficient ground of appeal;

(*c*) with the leave of the Court against the sentence passed on his conviction, unless the sentence is one fixed by law: Provided that a person sentenced to preventive detention within the meaning of the Prevention of Crime Act, 1908,[1] may appeal to the Court against such sentence without the leave of the Court.

SUBSECTION (3).—*General Powers of Appellate Court.*

1066. The powers of the appellate Court are defined in s. 2 as follows:—

2.—(1) The Court on any such appeal against conviction shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the Court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law, or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal: Provided that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred.

(2) Subject to the special provisions of this Act the Court shall, if they allow an appeal against conviction, quash the conviction.

(3) On any appeal against conviction the Court shall have the like power to quash the sentence passed and to pass another sentence as is conferred on the Court by the immediately succeeding subsection of this section in the case of an appeal against sentence.

(4) On any appeal against sentence the Court shall, if they think that a different sentence should have been passed, quash the sentence passed and pass such other sentence warranted in law (whether more or less severe) in substitution therefor as they think ought to have been passed, and in any other case shall dismiss the appeal.

SUBSECTION (4).—*Powers in Special Cases.*

1067. The powers of the Court in special cases are set forth in s. 3 as follows:—

3.—(1) If it appears to the Court that an appellant, though not properly convicted on some charge or part of the indictment, has been properly convicted on some other charge or part of the indictment, the Court may, instead of allowing or dismissing the appeal, substitute for the verdict found by the jury a verdict of guilty on such other charge or part of the indictment, and may either affirm the sentence passed on the appellant at the trial or pass such sentence in substitution therefor as

[1] 8 Edw. VII. c. 59.

they think proper, and as may be warranted in law by the verdict so substituted.

(2) Where an appellant has been convicted of an offence and the jury could on the indictment have found him guilty of some other offence, and on the finding of the jury it appears to the Court that the jury must have been satisfied of facts which proved him guilty of that other offence, the Court may, instead of allowing or dismissing the appeal, substitute for the verdict found by the jury a verdict of guilty of that other offence, and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law for that other offence.

(3) If on any appeal it appears to the Court that the appellant committed the act charged against him, but that he was insane at the time of committing the same, the Court may substitute for the verdict found by the jury a verdict of acquittal on the ground of insanity, and may quash the sentence passed at the trial and make such order for the detention of the appellant until His Majesty's pleasure be known, as may be made under s. 88 of the Lunacy (Scotland) Act, 1857, in the case of a person acquitted by a jury on the ground of insanity.

Subsection (5).—*Time for Appeal.*

1068. Sec. 4 provides for notice of appeal or of application for leave to appeal being given by the appellant within ten days of the date of his conviction in the case of appeal or application for leave to appeal against conviction, or within ten days of the date of his sentence in the case of appeal or application for leave to appeal against sentence, in such manner as may be directed by Act of Adjournal. Provision is to be made by such Act of Adjournal to enable any appellant to present his case and argument in writing instead of orally if he so desires, and any case or argument so presented shall be considered by the Court. Power is given to the Court to extend the time for appeal except in the case of a conviction involving sentence of death. In that case (and also in the case of a sentence of corporal punishment) there is special statutory provision contained in s. 4, subs. (2) and (3).

Subsection (6).—*Judge's Notes and Report.*

1069. Provision is made in s. 5 whereby the judge's notes at the trial, and a report by him giving his opinion on the case, or on any point arising therein, shall be furnished on appeal.

Subsection (7).—*Supplemental Powers.*

1070. Sec. 6 vests the Court with important supplemental powers. That section is as follows:—

6. For the purposes of this Act the Court may, if they think it necessary or expedient in the interest of justice—

(*a*) order the production of any document, or other thing connected with the proceedings, the production of which appears to them necessary for the determination of the case; and

(*b*) if they think fit, order any witnesses who would have been compellable witnesses at the trial to attend and be examined before the Court, whether they were or were not called at the trial, or order the examination of any such witnesses to be conducted in manner provided by Act of Adjournal before any judge of the Court or other person appointed by the Court for the purpose, and allow the admission of any depositions so taken as evidence before the Court; and

(*c*) if they think fit, receive the evidence, if tendered of any witness (including the appellant) who is a competent but not compellable witness, and, if the appellant makes an application for the purpose, of the husband or wife of the appellant, in cases where the evidence of the husband or wife could not have been given at the trial except on such an application; and

(*d*) where any question arising on the appeal involves prolonged examination of documents or accounts, or any scientific or local investigation, which cannot in the opinion of the Court conveniently be conducted before the Court, order the reference of the question in manner provided by Act of Adjournal for inquiry and report to a special commissioner appointed by the Court, and act upon the report of any such commissioner so far as they think fit to adopt it; and

(*e*) appoint any person with special expert knowledge to act as assessor to the Court in any case where it appears to the Court that such special knowledge is required for the proper determination of the case;

and exercise in relation to the proceedings under this Act any other powers vested in the Court, and issue any warrants necessary for enforcing the orders or sentences of the Court: Provided that in no case shall any sentence be increased by reason of or in consideration of any evidence that was not given at the trial.

Subsection (8).—*Appellant's Right to Attend.*

1071. The appellant is entitled, if he so desires, notwithstanding that he is in custody, to be present on the hearing of his appeal, except where the appeal is on some ground involving a question of law alone, in which case, as also in preliminary or incidental proceedings, he shall not be entitled to be present except the right is provided by Act of Adjournal, or with leave of the Court (s. 7). The power of the Court to pass any sentence under the Act may be exercised notwithstanding that the appellant is for any reason not present (s. 7 (2)).

SUBSECTION (9).—*Other Provisions.*

1072. Sec. 10 makes provision:—

(1) For the summary determination of frivolous or vexatious appeals.

(2) For the custody, pending appeal, of any documents, productions, or other things lodged in connection with the proceedings at the trial, in accordance with rules to be made by Act of Adjournal.

(3) For the furnishing to the appellant, or other person entitled thereto, by the Clerk of Justiciary, of all necessary forms and instructions in relation to appeal.

Sec. 11 provides that shorthand notes shall be taken of the proceedings at the trial of any person on indictment who, if convicted, is entitled or may be authorised to appeal under the Act, and a transcript of such notes, or any part thereof, shall be made if the Clerk of Justiciary so directs, and furnished to the appellant for the use of the Court or any judge thereof.

1073. On the hearing or determination of an appeal, or any proceedings preliminary or incidental thereto, no expenses shall be allowed on either side (s. 8).

Sec. 9 makes provision for the admission of the appellant to bail pending the determination of his appeal, for his presence in Court, and for his custody when attending Court.

Sittings of the Court shall be held both during session and during vacation as may be necessary for disposal of appeals. Three Lords Commissioners of Justiciary shall be a quorum (s. 12).

1074. Sec. 13 makes appeal by suspension incompetent in any proceedings on indictment in the Sheriff Court after 31st October 1926.

1075. By s. 14 the powers of the Court to give leave to appeal, to extend the time within which notice of appeal or of an application for leave to appeal may be given, to allow the appellant to be present at any proceedings in cases where he is not entitled to be present without leave, and to admit an appellant to bail, may be exercised by any judge of the Court in the same manner as they may be exercised by the Court, and subject to the same provisions; but, if the judge refuses an application on the part of the appellant to exercise any such power in his favour, the appellant shall be entitled to have the application determined by the Court.

The Court has power by Act of Adjournal to regulate the practice and procedure under the Act (s. 15).

1076. By s. 16 the prerogative of mercy is declared to be unaffected, and power is given to the Secretary for Scotland, on the consideration of any petition for the exercise of His Majesty's mercy having reference to the conviction of a person on indictment, or to the sentence (other than sentence of death) passed on a person who has been so convicted, either (*a*) to refer the whole case to the Court with a view to its determination as if on appeal under the Act; or (*b*) to refer any point to the Court for their opinion thereon, in which case the Court shall consider

the point so referred, and furnish the Secretary for Scotland with their opinion thereon accordingly.

The finality of proceedings of the Court is declared by s. 17 (1) of the Act, and s. 72 of the Criminal Procedure (Scotland) Act, 1887, shall have effect subject to the provisions of this Act.

Subsection (10).—*Grounds of Appeal.*

1077. In England, since the Criminal Appeal Act, 1907,[1] appeals have been sustained upon a variety of grounds. These grounds include the grounds upon which, according to the practice in our own Courts, the use has been to sustain appeals in suspensions, or other modes of review, of convictions obtained in the inferior Courts. But in addition to these generally recognised grounds, the English Courts have recognised misdirection of the jury by the presiding judge as a good ground of appeal. The Court will quash the conviction unless they can say that with proper direction the jury would *inevitably* have come to the same conclusion.[2]

1078. No sufficient direction on the law,[3] or on a cardinal matter,[4] is equivalent to misdirection, and is equally a good ground of appeal. The Court of Appeal will not criticise summings-up as if the judge were writing an accurate treatise of that part of the criminal law with which he was dealing, but when the effect of evidence has been wrongly put to the jury, a miscarriage of justice has taken place, and the verdict will be quashed.[5]

1079. Generally, any conduct, whether of the prosecutor or the judge, which is prejudicial to a fair trial, is a good ground for setting aside a conviction. For example, where the Crown in cross-examination made a prejudicial suggestion unsupported by evidence on a material point,[6] the Court quashed the conviction.

1080. In a suitable case the Court, instead of quashing the conviction, may vary the jury's verdict. For example, where the judge in a trial for murder in effect withdrew a defence of provocation which should have been left to the jury, the Court varied the verdict of murder to one of manslaughter.[7]

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[1] 7 Edw. VII. c. 23.
[2] *Marshall*, 1925, 18 Cr. App. R. 184.
[3] *Albert Bartlett*, 1920, 14 Cr. App. R. 157.
[4] *Willett*, 1922, 16 Cr. App. R. 146. See also *Vasilena*, 1912, 6 Cr. App. R. 231.
[5] *Mason*, 1908, 2 Cr. App. R. 61.
[6] *Alexander*, 1924, 18 Cr. App. R. 139.
[7] *Howard Ball*, 1924, 18 Cr. App. R. 149.

APPEAL

TO COURT OF SESSION AS COURT OF EXCHEQUER.
See EXCHEQUER; REVENUE.
IN LICENSING. *See* LICENSING LAWS.
AS TO RATES. *See* VALUATION AND RATING.

APPOINTMENT, POWER OF.

See ENTAIL; FACULTIES AND POWERS; MARRIAGE CONTRACT.

APPOINTMENT OF TRUSTEES.

See TRUSTEE.

APPORTIONMENT ACTS.

See EXECUTOR; HEIR; LIFERENT AND FEE; SUCCESSION.

APPREHENSION

OF CRIMINAL. *See* CRIME (PROCEDURE).
MALICIOUS. *See* REPARATION.
ON CIVIL DILIGENCE. *See* IMPRISONMENT FOR DEBT.

APPRENTICE.

See LAW AGENT; MASTER AND SERVANT.

APPRISING.

See ADJUDICATION.

APPROBATE AND REPROBATE.

See ELECTION.

APPROPRIATION

OF GOODS. *See* SALE OF GOODS.
OF PAYMENT. *See* PAYMENT; MONEY AND MONEYLENDERS.
OF PROPERTY. *See* CRIME.
OF TRUST FUNDS. *See* TRUST.

AQUÆDUCTUS. AQUÆHAUSTUS.

See SERVITUDE.

ARBITRARY PUNISHMENT.

See CRIME (PUNISHMENT).

ARBITRATION.

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Section 1.—The Contract.

1081. Arbitration is a process by which any matter on which parties are not agreed is submitted to the final decision of a private tribunal. The tribunal is described as the "arbiter" or the "arbiters," according as it consists of one individual or two or more. Where the original reference is to a tribunal of two, and an ulterior *forum* is provided in the

shape of a single judge, whose jurisdiction is only operative in the event of the arbiters failing to agree on a decision, this person is termed the "oversman." The process may originate in a special contract directed to that precise end, which is called a "submission" or "minute of reference"; or it may arise as an "ancillary submission" under a term of a contract which deals with other matters; or it may be, and frequently is, prescribed by statute as the method of settling questions, the emergence of which is contemplated by Parliament as the result of legislation. Whether it be adopted by consent or enjoined by operation of statute the legal implications of the arbitration, as these affect the reciprocal rights and duties of all parties concerned, are, except for minor details, and apart from specialties in the statute or contract concerned, identical. The decision of the private tribunal is termed a "decree arbitral" or "award," which are equivalent terms.[1]

1082. As the tribunal is to be taken as having been set up by private contract, its judgment is binding on the parties only so far as it is within the contract as to scope, as to the method by which it is procured, and as to the manner in which the tribunal has conducted proceedings. But it has long been a principle of Scots law that the award of an arbiter cannot be reviewed on its merits by the Court.

Section 2.—Arbitration as distinguished from Valuation.

1083. The question has been agitated whether and to what extent Scots law recognises any distinction between an arbitration proper, the submission of a dispute or *lis*, and a valuation or the submission of a *negotium*, in which the object of the proceedings is not to settle a difference but to prevent one arising. This distinction is apparently recognised in England in relation to certain questions of procedure.[2] There is some support, not very well defined, for a similar distinction in some Scots cases. It has been suggested as a ground justifying a review of the "valuers'" judgment on the merits,[3] as explaining exceptions to the old rules that an arbiter was not able to sue for remuneration[4] and that a reference to unnamed arbiters was bad,[5] and as warranting a laxity of procedure which might have proved fatal in other circumstances.[6] It is now settled that the distinction that exists in England does not exist in Scotland, and that the word "arbitration" in a statute includes a "valuation."[7]

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[1] *Earl of Hopetoun* v. *Scots Mines Co.*, 1856, 18 D. 739, per L. Deas at p. 755.
[2] *In re Hopper*, 1867, L.R. 2 Q.B. 367.
[3] *Robertson* v. *Clephan*, 1756, 5 Br. Supp. 852.
[4] *Kennedy* v. *Kennedy*, 20th Jan. 1819, F.C.
[5] *Smith* v. *Wharton-Duff*, 1843, 5 D. 749, per L. Fullerton at p. 752.
[6] *Nivison* v. *Howat*, 1883, 11 R. 182; *Robertson* v. *Boyd & Winans*, 1885, 12 R. 419, per L. Young at p. 430.
[7] *Stewart* v. *Williamson*, 1909 S.C. 1254, per L. Pres. Dunedin at p. 1258 (aff. 1910 S.C. (H.L.) 47).

1084. Decisions of the Court [1] and the passing of the Arbitration (Scotland) Act [2] have either negatived or superseded most of the practical results supposed to flow from the distinction with the exception of those in relation to procedure in informal arbitrations. It is suggested that the true ratio of these latter is that in such references the parties are not to be taken as having contracted for the formalities of procedure, and that accordingly the Court does not insist on them.[3]

Section 3.—Procedure extra cursum curiæ in Ordinary Litigations.

1085. It sometimes happens that litigants by consenting to procedure *extra cursum curiæ* constitute the judge in the case an arbiter, and thereby exclude a review of his judgment which would have been open under other circumstances.[4] But this consequence can only flow where there is (1) a complete deviation from ordinary procedure ; (2) agreement thereto by the parties, and (3) assent of the judge. Mere deviation from the ordinary course of procedure is not enough.[5] And a consent to a remit to a man of skill does not constitute him arbiter unless the case is one where the remit is *extra cursum curiæ*. Where the remit is in ordinary course, the report may be challenged later.[6] The principle can have no application in criminal or quasi-criminal proceedings.[7]

Section 4.—Proof of the Contract.

1086. Submissions may be verbal [8] or written. Verbal submissions are confined within narrow though ill-defined limits, and apart from a recognised exception of references regarding marches,[9] are of no practical importance. They should be avoided.[10] As regards written submissions, unless the subject-matter be heritage, writing is required only *in modum probationis* and not *de solennitate*.[11] A complete exposition of the implications of this distinction will be found in formal works on the law of contract.[12] A submission relating to heritage must be, and submissions in general whatever their subject-matter usually are, embodied in a carefully framed probative deed. But

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[1] *Morrison* v. *Aberdeen Market Co.*, 1847, 9 D. 910, refusing to follow *Robertson* v. *Clephan, supra* ; *Macintyre Brothers* v. *Smith*, 1913 S.C. 129. (Professional man as arbiter entitled to remuneration.)

[2] Arbitration (Scotland) Act, 1894 (57 & 58 Vict. c. 13).

[3] *Macgregor* v. *Stevenson*, 1847, 9 D. 1056 ; *Nivison* v. *Howat, supra* ; *Gibson* v. *Fotheringham*, 1914 S.C. 987.

[4] *White* v. *Lord Morton's Trs.*, 1866, 4 M. (H.L.) 53, per L. C. Cranworth at p. 58.

[5] *Gordon* v. *Bruce & Co.*, 1897, 24 R. 844.

[6] *Steel* v. *Steel*, 1898, 25 R. 715, per L. M'Laren at p. 720.

[7] *Stark's Trs.* v. *Duncan*, 1906, 8 F. 429.

[8] Bell on Arbitration, 2nd ed., p. 52, para. 81.

[9] *Livingstone* v. *Feuars of Falhouse*, 1662, M. 2200 ; *P. F. of Roxburgh* v. *Ker*, 1672, M. 12410 ; *Otto* v. *Weir*, 1871, 9 M. 660.

[10] Bell, p. 57, para. 96.

[11] Bell, p. 56, para. 93, 94.

[12] Gloag on Contract, cc. 12 and 13.

in this, as in other contracts, homologation or *rei interventus* may supply the want of formalities of execution.[1] Even an unsigned submission has been held binding in relation to heritage after it had been acted on ; [1] and the Courts have repeatedly sustained contracts to submit embodied in the most informal shape, more especially *in re mercatoria*. A course of correspondence,[2] a joint memorial to counsel,[3] informal missives,[4] and a contractor's letter [5] have been sustained as contracts to refer.

Section 5.—Who may refer to Arbitration.

1087. "All persons may enter into a contract of submission who are under no disability in adhibiting an obligatory consent to a personal contract. But it is requisite to an effective award that the parties should possess full power over the subjects which are submitted to arbitration ; to the extent at least to which the award shall ultimately affect these subjects." [6]

1088. Legislation has rendered obsolete most questions as to the limits of the powers of married women,[7] trustees, executors-nominate, tutors, curators, and judicial factors [8] to enter into submissions. Their powers are now of the widest. The limitations under which a minor enters a submission are precisely those which affect him in other contracts ; and a pupil acts through his tutor. A minor's right to reduce a submission on the ground of minority and lesion does not go further than to entitle him to challenge the contract as itself imprudent, as having been made to a badly chosen arbiter, or as having been badly conducted : it does not open a challenge of the award on its merits.[9] An heir of entail cannot by entering into a submission bind a succeeding heir to any greater extent than he could do by direct deed. But the special position of an heir of entail is provided for in many statutes which prescribe arbitration as a method of settling disputes.[10] A partner of a firm has not at common law any power to bind the firm to a submission.[11] A trustee in a sequestration may submit with the consent of the commissioners.[12] And where bankruptcy of one of the parties supervenes during the currency of a submission, the trustee of the bankrupt is bound

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[1] *Brown & Colvill* v. *Gardner*, 1739, M. 5659 ; Bell on Arbitration, 2nd ed., p. 45, and cases *ib. cit.*, para. 62.

[2] *Maclellan* v. *Macleod*, 1830, 4 W. & S. 157.

[3] *Fraser* v. *L. Lovat*, 1850, 7 Bell's App. 171.

[4] *Dykes* v. *Roy*, 1869, 7 M. 357.

[5] *Chapman* v. *Edinburgh Prison Board*, 1844, 6 D. 1288.

[6] Bell on Arbitration, 2nd ed., pp. 97 and 98, para. 158.

[7] Married Women's Property (Scotland) Act, 1920 (10 & 11 Geo. V. c. 64), s. 3.

[8] Executors (Scotland) Act, 1900 (63 & 64 Vict. c. 55), s. 2 ; Trusts (Scotland) Act, 1921 (11 & 12 Geo. V. c. 58), ss. 2 and 4.

[9] Bell on Arbitration, 2nd ed., p. 103, para. 175 ; *Williamson* v. *Frasers*, 1739, M. 665.

[10] Lands Clauses (Scotland) Act (8 & 9 Vict. c. 19), s. 7 ; Agricultural Holdings (Scotland) Act, 1923 (13 & 14 Geo. V. c. 10), s. 39 ; Entail (Scotland) Act, 1914 (4 & 5 Geo. V. c. 43), s. 5.

[11] *Lumsden* v. *Gordon*, 1728, M. 14567.

[12] Bankruptcy (Scotland) Act, 1913 (3 & 4 Geo. V. c. 20), s. 172.

by the award if notice of the dependence is given to him, whether he appear or not ; [1] but if no intimation is given he may reduce the award as pronounced *parte inaudita*.[2]

1089. A general mandate does not give the mandatary power to bind his constituent to a submission.[3] Advocates, unless forbidden by their instructions, have,[4] but law agents [5] have not, power to submit without express authority of the client. And an agent has been held bound to implement personally the award in a submission not authorised by the client whom he purported to bind.[6] In any case the agent would be liable for breach of warranty of authority.[7]

Section 6.—What may be referred to Arbitration.

1090. Parties may refer to arbitration any question of right or interest, whether affecting heritage or moveables, with regard to which they are in a position to enter into a binding contract.[8] Breach of contract, partnership disputes, disputed debts, the amount of aliment,[9] questions of law,[10] pending litigations, the future use of heritable property,[11] or future disputes to arise in the execution of a contract [12] may all be referred. But a decision by the creditors in a sequestration to submit *per aversionem* all disputes in the sequestration is *ultra vires*.[13]

1091. A submission may be unenforceable as relating to illegal or immoral subject-matter.[14] There is no Scots authority in relation to submissions, but the English cases embody a principle common to the law of both countries.[15]

1092. Questions in which the public as well as the parties have an interest, such as status,[16] domicile, the right to tutory,[17] criminal or quasi-criminal [18] matters, may not be referred. But a submission of "all claims, debts, and demands" by a trustee for creditors was held to embrace the question whether a document of debt founded upon had been obtained by fraud, the incidental determination of this being necessary to settle the real question at issue.[19]

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[1] *Grant* v. *Girdwood*, 23rd June 1820, F.C.
[2] *Barbour* v. *Wight*, 21st Nov. 1811, F.C.
[3] Ersk. Inst. iii. 3, 39.
[4] *Gilfillan* v. *Brown*, 1833, 11 S. 548.
[5] *Black* v. *Laidlaw*, 1844, 6 D. 1254.
[6] *Livingstone* v. *Johnstone*, 1830, 8 S. 594.
[7] *Collen* v. *Wright*, 1857, 8 E. & B. 647.
[8] Bell, p. 120, para. 216.
[9] *Shand* v. *Shand*, 1832, 10 S. 384.
[10] *N.B. Rly. Co.* v. *Newburgh & North Fife Rly. Co.*, 1911 S.C. 710, per L. Pres. Dunedin at p. 719.
[11] *Gray* v. *Brown*, 1833, 11 S. 353 (Roads); *Wight* v. *Earl of Hopetoun*, 1856, 18 D. 118 (Timber); *Pearson* v. *Oswald*, 1859, 21 D. 419 (Minerals).
[12] *Mackay* v. *Police Commrs. of Leven*, 1893, 20 R. 1093.
[13] *Cook* v. *Moubray*, 1829, 7 S. 778.
[14] Gloag on Contract, c. 30.
[15] *Steers* v. *Lashley*, 1794, 6 T.R. 61 (Illegal stock-jobbing); *Aubert* v. *Maze*, 1801, 2 Bos. & Pull. 371 (Illegal partnership).
[16] Bell on Arbitration, 2nd ed., p. 122, para. 220.
[17] *Ramsay* v. *Hay*, 1624, M. 16245.
[18] *Stark's Trs.* v. *Duncan*, 1906, 8 F. 429.
[19] *Earl of Kintore* v. *Union Bank*, 1863, 1 M. (H.L.) 11.

Section 7.—Construction of the Contract.

Subsection (1).—*Submissions in General.*

1093. A submission, being a contract, falls to be interpreted according to the ordinary rules of construction.[1] The contract delimits the jurisdiction of the arbiter, and as parties are only bound to implement an award conforming in its scope to these limits, they should be defined with precision. During the arbitration doubts may arise as to the scope of the reference. It is then the duty of the arbiter to explicate his jurisdiction by forming his own judgment on the question in the first instance ; [2] and the Court will be slow to interfere with a going process of arbitration, even though there is a risk of the arbiter going wrong, whether the arbitration is statutory [3] or under an ordinary submission.[4] But the final pronouncement on the arbiter's jurisdiction [5] belongs to the Court and not to the arbiter.

1094. There is authority [6] that a submission should be liberally construed ; but it would appear that the parties should not be considered as intending to oust the jurisdiction of the Court except to the extent to which they have expressly agreed.[7] Where there is ambiguity in a submission the contract may be interpreted,[8] or even held to have been extended by the actings of parties.[9]

1095. Classic authority subdivides submissions into three types — special, general, and general-special.[10] In the first of these the subject-matter of the reference is defined as a particular question. Each such contract falls to be interpreted according to its own terms.

1096. A general submission is a reference of "all demands, claims, etc., presently subsisting between A and B." Wide as the words are, they will not bring before the arbiter a plea of compensation,[11] or invest him with the power to assess damages ; [12] and they only cover disputes existing and unsopited at the date of entering into the contract.[13] As the parties have not defined the scope of the submission, the arbiter ought to have the disputes formulated by ordering written pleadings. In the event of litigation these will enable the Court to ascertain how the

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[1] *Lang* v. *Brown*, 1855, 2 Macq. 93, per L. C. Cranworth at p. 94.
[2] Bell on Arbitration, 2nd ed., p. 57, para. 97 ; *Bell* v. *Graham*, 1908 S.C. 1060.
[3] *Dumbarton Waterworks Commrs.* v. *Lord Blantyre*, 1884, 12 R. 115.
[4] *Licenses Insurance Corporation* v. *Shearer*, 1907 S.C. 10.
[5] *Adams* v. *G.N.S. Rly.*, 1890, 18 R. (H.L.) 1, per L. Watson at pp. 8, 9.
[6] Ersk. Inst. iv. 3, 32.
[7] *Calder* v. *Mackay*, 1860, 22 D. 741, per L. J.-C. Inglis at p. 744 ; *Holmes Oil Co.* v. *Pumpherston Oil Co.*, 1890, 18 R. (H.L.) 52, per L. Watson at p. 55.
[8] *Orrell* v. *Orrell*, 1859, 21 D. 554.
[9] *N.B. Rly.* v. *Barr*, 1855, 18 D. 102 ; *Miller & Son* v. *Oliver & Boyd*, 1906, 8 F. 390, per L. Pres. Dunedin at pp. 401, 402.
[10] Bell on Arbitration, 2nd ed., p. 59, para. 101.
[11] *M'Ewan* v. *Middleton*, 1866, 5 M. 159, per L. J.-C. Inglis at p. 163.
[12] *Blaikies* v. *Aberdeen Rly. Co.*, 1852, Paterson's App., 119 ; *N.B. Rly.* v. *Newburgh & North Fife Rly.*, 1911 S.C. 710, per L. Pres. Dunedin at p. 719.
[13] Bell, p. 60, para. 105 ; *Hood* v. *Baillie*, 1832, 11 S. 207, per L. O. Moncreiff at p. 209.

contract was understood and acted upon by the parties.[1] Failing written pleadings, the Court have arrived at the intentions of parties from various circumstances.[2] The arbiter's notes may be used to shew what was pleaded before him.[3]

Where the submission is conceived in general terms, to which is subjoined a specification of particulars, the limitation of the generality to matters *ejusdem generis* with the particulars is to be presumed.[4]

Subsection (2).—*Arbitration Clauses in Contracts.*

1097. Where the agreement to refer appears as a term in another contract, as *e.g.* a partnership or a building contract, difficult questions of interpretation may arise. Such clauses must be construed *secundum subjectam materiem.* Being embedded in another contract, they are to be taken as relating to the same subject-matter, though the generality of their terms might suggest otherwise. Thus a clause in a partnership agreement that " if any difference shall arise between the partners " the same was to go to arbitration was held not to cover a claim for a fraudulent breach of partnership obligation alleged to have damaged the company and the pursuer.[5] But although the precise phase of the emergent dispute may not have been contemplated when the contract was framed, if it be within the scope of the arbitration clause fairly interpreted, it goes to arbitration.[6] Even where legislation which has supervened since the signing of the contract has altered the situation so as to throw open to one party claims which were not contemplated when the contract was made, the arbitration clause applies to the dispute if it is framed in terms apt to cover it.[7]

1098. Such clauses in building and construction contracts have been a fruitful source of litigation. " The contracting parties may create a tribunal for settling differences which may occur in the course of executing the works, and which has no other function. But of course they may do more and extend it to the decision of any claim which may arise out of the contract. In this case the reference is not less executorial of the contract than when it is confined to the settlement of questions which may arise during the execution of the works. It is or may be otherwise with respect to questions based on allegations of breach of contract, and it is true that without express power an arbiter cannot

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[1] *Maxwell* v. *Maxwell*, 1624, 1 Br. Supp. 15.

[2] *Steele* v. *Steele*, 22nd June 1809, F.C. (A process in Court); *Finlay & Co.* v. *Campbell's*, 1834, 12 S. 792 (Correspondence).

[3] Bell, p. 66, para. 113; *Wauchope* v. *Edinburgh & Dalkeith Rly.*, 1846, 8 D. 816, per L. J.-C. Hope at p. 820.

[4] Bell, p. 68, para. 118; *Incheffray* v. *Oliphant*, 1607, M. 5023.

[5] *Lauder* v. *Wingate*, 1852, 14 D. 633.

[6] *Miller* v. *Howie*, 1851, 13 D. 608.

[7] *N.B. Rly.* v. *James Nimmo, Ltd.* Not reported; judgment of L. C. Birkenhead quoted in *Scott & Sons* v. *Del Sel*, 1922 S.C. 592 (affd. 1923 S. C. (H.L.) 37), per L. Hunter at p. 604.

assess damages." [1] As appears from this statement of the law by Lord Rutherfurd Clark, which has been repeatedly cited with approval as expressing the principle to be applied, the clause may be in restricted terms, or it may be of the "ample variety which includes every form of dispute." [2] The application of the principle to any concrete case may be a matter of difficulty. In each case it is a matter of interpretation, and the decided cases are merely judicial interpretations of the special formula used in each particular instance.

1099. A reference to "A. B., mining engineer," of disputes as to "the meaning or execution of" a mineral lease did not cover a legal question ; [3] a reference to the architect in a building contract has been held not to cover disputes as to measurement arising on completion.[4] But a general reference clause in a building contract conferred on the architect, who under the terms of the bargain had power to bring the contract to an end and had done so, power to assess the value of the work done up to that date.[5] Where goods had been accepted, a clause referring to arbitration all questions as to the make or material of the goods was held not to apply to a claim for damages for late delivery and questions of latent defects of material and workmanship ; [6] but a reference as to "the rights of parties under the contract" did cover a claim for liquidate damages for delay, the excuse alleged for the delay being "excepted causes" under the contract.[7] In the leading case the clause was held to give the arbiter power to assess an unpaid balance due to the contractor.[8] And a dispute between two railway companies which involved the question of whether one of them has acted *ultra vires* of its statutory powers fell within the arbitration clause in a contract between them.[9] Under a clause of the "ample variety," a dispute as to whether the actings of one of the parties to the contract amounted to repudiation [10] was held a matter for the arbiter; and in a partly executed contract it has been said that he would have jurisdiction to determine whether there had been frustration as to the remainder.[11]

1100. No such clause can be binding unless in its terms it covers disputes between the parties between whom the difference has arisen. In a partnership contract, which referred to arbitration disputes "arising among the partners," a dispute between one of the partners and the partnership as a whole was not covered by the clause.[12] And where A

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[1] *Mackay* v. *Parochial Board of Barry*, 1883, 10 R. 1046, per L. Rutherfurd Clark at p. 1050.

[2] *Sanderson* v. *Armour*, 1922 S.C. (H.L.) 117, per L. Dunedin at p. 126.

[3] *Pearson* v. *Oswald*, 1859, 21 D. 419.

[4] *Kirkwood* v. *Morrison*, 1877, 5 R. 79 ; *Beattie* v. *Macgregor*, 1883, 10 R. 1094.

[5] *Scott* v. *Gerrard*, 1916 S.C. 793.

[6] *Savile Street Foundry* v. *Rothesay Tramways Co.*, 1883, 10 R. 821.

[7] *Levy & Co.* v. *Thomsons*, 1883, 10 R. 1134.

[8] *Mackay* v. *Parochial Board of Barry*, 1883, 10 R. 1046.

[9] *N.B. Rly.* v. *Newburgh & North Fife Rly. Co.*, 1911 S.C. 710.

[10] *Sanderson* v. *Armour*, 1922 S.C. (H.L.) 117.

[11] *Scott & Sons* v. *Del Sel*, 1923 S.C. (H.L.) 37, per L. Dunedin at p. 41 ; but see *Hirji Mulgi & Ors.* v. *Cheong Yue Steamship Co., Ltd.*, [1926] A.C. 497.

[12] *Gerry* v. *Caithness Flagstone Quarrying Co.*, 1885, 12 R. 543.

entered into a contract with B—the work to be done according to a "general specification" (which contained the arbitration clause)—and thereafter B entered into a subcontract with C for part of the works, they in their turn to be executed according to the same "general specification," it was held that C was only bound by the arbitration clause to the effect of compelling him to accept decisions thereunder in questions which had arisen between A and B, and that it did not cover questions between B and C.[1]

Section 8.—Endurance of the Contract.

Subsection (1).—*In General.*

1101. The extent in time of the jurisdiction conferred on the arbiter depends on the terms of the contract of submission, and so lies entirely in the hands of the parties, apart from cases where a special time-limit is imposed by statute.[2] But even where a statutory limit is imposed the parties may agree to waive it,[3] unless possibly in cases where the power to appoint an arbiter, and if need be to extend the time for his making an award, is given to some outside party.[4]

1102. The common form of the submission in Scots practice gives the arbiter power to decide "between this and the day of next to come." Where duration is thus left blank the submission stands good for a year and a day without further action by either parties or arbiter.[5] If the submission is not blank as to endurance, and imposes no limit, the arbiter's powers endure for forty years.[6] But if the submission fixes a definite time-limit without empowering the arbiter to extend it, the contract automatically falls on expiry of the time,[7] unless the parties by express agreement or by a course of conduct extend its duration.[8]

1103. Where a submission, blank as to endurance, is on the point of expiry, the arbiter may, if so empowered by the deed, extend its endurance by a formal act termed prorogation. The power to prorogate must be conferred on the arbiter *per expressum*.[9] Being an act of jurisdiction, prorogation requires the exercise of judicial discretion,[10] but it needs neither previous notice nor subsequent intimation to the parties.[11] It must be in writing, but as an official act of the arbiter it is sufficiently

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[1] *Goodwins, Jardine & Co.* v. *Brand & Son*, 1905, 7 F. 995.

[2] Agricultural Holdings (Scotland) Act, 1923 (13 & 14 Geo. V. c. 10), Sched. 2, rule 5; Lands Clauses (Consolidation) Scotland Act, 1845 (8 Vict. c. 19), ss. 30 and 35.

[3] *Caledonian Rly. Co.* v. *Lockhart*, 1860, 3 Macq. 808.

[4] Agricultural Holdings (Scotland) Act, 1923 (13 & 14 Geo. V. c. 10), Sched. 2, rule 5.

[5] *Earl of Dunmore* v. *M'Inturner*, 1829, 7 S. 595.

[6] *Fleming* v. *Wilson & M'Lellan*, 1827, 5 S. 906; *Hill* v. *Dundee & Perth Rly.*, 1852, 14 D. 1034.

[7] *Cunningham* v. *Drummond*, 1491, M. 635.

[8] *Paul* v. *Henderson*, 1867, 5 M. 613.

[9] Bell on Arbitration, 2nd ed., p. 177, para. 325.

[10] *Lang* v. *Brown*, 1855, 2 Macq. 96, per L. C. Cranworth at p. 100.

[11] *Ewing & Co.* v. *Dewar*, 19th Dec. 1820, F.C.

authenticated by his signature without instrumentary witnesses.[1] Once the arbiters' powers have fallen by expiry of time, or by devolution of the whole submission on an oversman, it is no longer within their power to prorogate, nor does prorogation by an oversman keep alive the powers of the arbiters as to any part of the submission not devolved.[2] Where no power of prorogation is conferred on the arbiter, parties may extend the contract by express bargain at any time. This is in essence a new submission,[3] but when executed by way of minute on the original submission does not require a stamp.[4] Even where no formal prorogation by the arbiter or parties exists, unequivocal acts, such as appearing and pleading in a process without challenge, may infer an extension of the arbiter's powers and supply the want of a formal writing.[5] But these acts must be done in full knowledge of all the circumstances.

1104. In a reference to two arbiters and an oversman a power to prorogate on the part of the oversman will be inferred, though not granted *per expressum*, if it has been conferred on the arbiters.[6]

Subsection (2).—*Arbitration Clauses in Cases where the Principal Contract has been Rescinded, Repudiated, or Frustrated.*

1105. Where a contract to refer is embedded as an arbitration clause in a contract relating to other matters, it stands or falls with the principal contract. Accordingly, where one party is in breach and the other validly exercises his remedy of rescission, the whole contract is determined and the arbitration clause with it.[7] But there must have been a valid rescission or admitted repudiation. And it is not enough to exclude the operation of the arbitration clause for one party to come into Court averring that the other has repudiated the contract.[8] In such a case there may be a question of construction as to whether the dispute falls under the arbitration clause; if it does, it goes to the arbiter, and it would be for him to decide on the question of repudiation.[9] If the principal contract is frustrated, it automatically comes to an end and the arbitration clause with it. "The arbitration clause is but part of the contract, and unless it is couched in such terms as will except it out of the results which follow from frustration generally, it will come to an end too. This must be so if the law is that the legal effect of frustration is the immediate termination of the contract as to all matters and disputes which have not already arisen."[10] In a contract which

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[1] *Gordon* v. *Monteith*, 10th Dec. 1812, F.C.
[2] *Lang* v. *Brown*, 1855, 2 Macq. 96.
[3] *Hill* v. *Dundee & Perth Rly.*, 1852, 14 D. 1034.
[4] *Paterson* v. *Sanderson*, 1829, 7 S. 616.
[5] *Paul* v. *Henderson*, 1867, 5 M. 613.
[6] *Glover* v. *Glover*, 1805, 4 Paton 655.
[7] *Sanderson* v. *Armour*, 1921 S.C. 18 (affd. 1922 S.C. (H.L.) 117), per L. Mackenzie at p. 28; *Hegarty & Kelly* v. *Cosmopolitan Insurance Corpn.*, 1913 S.C. 377; *Mun. Coun. of Johannesburg* v. *D. Stewart & Co.*, 1909 S.C. (H.L.) 53, as explained in *Sanderson* v. *Armour*, *supra*, 1922 S.C. (H.L.) 117, per L. Shaw at p. 130.
[8] *Sanderson* v. *Armour*, 1922 S.C. (H.L.) 117.
[9] *Ibid.*, per L. Dunedin at pp. 126, 127.
[10] *Hirji Mulji & Ors.* v. *Cheong Yue Steamship Co., Ltd.*, [1926] A.C. 497, per L. Sumner at p. 505.

at the moment of frustration is wholly executory, the clause as part of one indivisible contract ceases to be operative. But in the case of a contract which is partly executed at the moment of frustration, the contract and the clause remain effective for the purpose of vindicating rights already acquired. "Though the contract comes to an end on the happening of the event" (frustration), "rights and wrongs which have already come into existence remain, and the contract remains too for the purpose of giving effect to them." [1] Frustration by operation of law must be distinguished from cases where the contract by an express term specifically provides that in certain events the prestations *hinc inde* shall no longer be exigible. Where this is the case the application of such a clause to the facts of the case is a matter arising under the contract and falls to be determined through the machinery of the arbitration clause.[2]

Subsection (3).—*Death of Party or Arbiter.*

1106. Apart from special bargain a submission falls by death of either of the parties.[3] Death of one of a body of trustees does not end a reference to which they are parties.[4] And this rule does not apply to arbitrations necessary to explicate another contract,[5] nor to a judicial reference.[6] The contract likewise falls by death of an arbiter, judicial referee, or an oversman on whom the reference has devolved.[7]

Subsection (4).—*Impossibility of Performance.*

1107. Where, owing to supervening circumstances, an arbitration in the form in which it was contemplated by the parties in entering into the contract to refer has become impossible, the contract falls. Thus where an agreement to refer contemplated that the subject-matter of the reference, agricultural stocking, should be valued by personal inspection by the arbiters, and this became impossible owing to the destruction of the articles, the arbitration contract fell.[8]

Section 9.—The Arbitration (Scotland) Act, 1894.

1108. At common law an agreement to refer future disputes to an unnamed arbiter was ineffectual,[9] even though the arbiter were indicated as the holder of an office for the time being.[10] An exception was admitted where the reference was necessary to explicate a contract already

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[1] *Hirji Mulgi & Ors.* v. *Cheong Yue Steamship Co., Ltd.*, [1926] A.C. 497, per L. Sumner at p. 510.

[2] *Ibid.*, per L. Sumner at 512; *Scott* v. *Del Sel*, 1923, S.C. (H.L.) 37, per L. C. Cave at p. 41.

[3] Ersk. Inst. iv. 3, 29; *Robertson* v. *Cheyne*, 1847, 9 D. 599; *Ewing & Co.* v. *Dewar*, 19th Dec. 1820, F.C.

[4] *Alexander's Trs.* v. *Dymock's Trs.*, 1883, 10 R. 1189.

[5] *L. Selkirk* v. *Nasmyth*, 1778, M. 627.

[6] *Watmore* v. *Burns*, 1839, 1 D. 743.

[7] Ersk. Inst. iv. 3, 34.

[8] *Graham* v. *Mill*, 1904, 6 F. 886.

[9] *Tancred, Arrol & Co.* v. *Steel Co. of Scotland*, 1890, 17 R. (H.L.) 31.

[10] *Hendry's Tr.* v. *Renton*, 1851, 13 D. 1001.

entered into,[1] or where an award was a condition precedent to the emergence of liability under a contract.[2] This common law rule has been completely altered by the Arbitration (Scotland) Act, 1894.[3] The Act provides (s. 1) that an agreement to refer shall not be ineffectual by reason of the arbiter being (*a*) a person unnamed, (*b*) a person to be nominated by another, or (*c*) the holder of an office for the time being. Sections 2, 3, and 4 provide respectively for failure to concur in the nomination of a single arbiter, failure by one party to nominate one of two arbiters, and failure by the arbiters to agree on an oversman. Further, in all cases where the submission does not prohibit it, power is conferred on two arbiters to appoint an oversman. The method of working out the Act is by petition to a Lord Ordinary or a sheriff having jurisdiction.

1109. A reference to "arbitration,"[4] or to "arbitration within the provisions of the Arbitration (Scotland) Act, 1894,"[5] or to "arbitration in the customary manner of the timber trade"[6] is a good reference, even although the number of arbiters is not specified. But failure to describe the constitution of the tribunal may prevent the immediate application of ss. 2 and 3.[7] The Act contemplates procedure by way of petition and answers, and where the application is opposed on the ground of "no jurisdiction," or no binding contract, or no agreement to refer, this summary procedure is not appropriate to settle complex legal questions.[8] But the Lord Ordinary in dealing with a petition is acting in a judicial and not merely in a ministerial capacity, and has power to explicate his own jurisdiction;[9] and the mere fact that the agreement to refer is not a plain case falling under s. 2 or s. 3 but requires inquiry, as for instance a reference to "arbitration in Glasgow," where it is averred that in the particular trade this means a reference to two arbiters and an oversman, is not sufficient to render a petition under the Act incompetent.[10] If the application involves anything more than the mere act of appointment it should not be dealt with in the summary roll in the Sheriff Court but in the ordinary roll.[11] The Act does not apply to the case of a named arbiter who will not act, unless the submission contains an ulterior reference such as "whom failing to an arbiter to be appointed by the parties."[12] There is no need where the Court is appointing an oversman under s. 4 to wait until the arbiters have

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[1] *Smith* v. *Wharton-Duff*, 1843, 5 D. 749.
[2] *Caledonian Insurance Co.* v. *Gilmour*, 1892, 20 R. (H.L.) 13.
[3] Arbitration (Scotland) Act, 1894 (57 & 58 Vict. c. 13).
[4] *M'Millan & Son* v. *Rowan & Co.*, 1903, 5 F. 317.
[5] *Wylie Hill & Co.* v. *Profits & Income Insurance Co.*, 1904 (O.H.), 12 S.L.T. 407.
[6] *Douglas & Co.* v. *Stiven*, 1900, 2 F. 575.
[7] *M'Millan & Son* v. *Rowan & Co.*, *supra*.
[8] *Cooper & Co.* v. *Jessop & Co.*, 1906, 8 F. 714.
[9] *Ibid.*, per L. Low at p. 723.
[10] *United Creameries Co., Ltd.* v. *Boyd & Co.*, 1912 S.C. 617.
[11] *Ibid.*
[12] *British Westinghouse and Electric Manufacturing Co., Ltd.* v. *Provost, etc., of Aberdeen*, 1906 (O.H.), 14 S.L.T. 391.

differed before applying.[1] It has been held in the Outer House that a reference to "neutral men mutually chosen" reasonably construed meant a reference to two arbiters and fell under s. 3;[2] and where one party insists on a formal reference and refuses to concur in nominating an arbiter for informal procedure, this is refusal to nominate an arbiter within the meaning of s. 3.[3]

Section 10.—Who may be Arbiter.

1110. An arbiter being a private judge, parties may select whom they please. Even a minor may act,[4] and there are few personal disqualifications which cannot be waived. In a somewhat special case a reference to a fluctuating body was held good,[5] and a reference may be made to a firm.[6] A judge may continue to act in a submission commenced before but not completed at the date of his elevation to the Bench.[7]

1111. The office being judicial, the arbiter should not have an interest in the dispute. Such interest, if not known to the parties, will disqualify the arbiter and render any award invalid. A shareholder in a public company cannot act as arbiter in a submission to which the company is a party, however trifling his interest.[8] Any substantial interest in the dispute, not known to the parties when the arbiter was selected, will disqualify.[9] But the objection of interest may be waived if it be known. It is even competent for one party to refer the decision of a dispute to his adversary as an arbiter.[10]

1112. Where an arbiter is open to the charge of having by words or acts shewn a bias before he takes up the reference, he is disqualified from acting, as for instance where he has been examined as witness for one party relative to the subject in dispute,[11] or has accepted nomination with a promise to do all in his power for his nominator,[12] or has shewn himself committed to an *ex parte* view.[13] It has not been settled whether an arbiter who has pronounced an award which has been set aside by the Court is disqualified.[14] In England he would be held to be *functus officio*.[15]

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[1] *Glasgow P.C.* v. *United Collieries, Ltd.*, 1907 (O.H.), 15 S.L.T. 232.

[2] *Macintyre & Ors.* v. *Ponsonby & Anr.*, 1909 (O.H.), 2 S.L.T. 266 (rev. on another point, 1909, 2 S.L.T. 340).

[3] *Hugh Highgate & Co.* v. *British Oil and Guano Co.*, 1914 (O.H.), 2 S.L.T. 241.

[4] *Gordon* v. *Earl of Errol*, 1582, M. 8915.

[5] *Bremner & Elder* v. *Elgin Lunacy Board*, 1875, 2 R. (H.L.) 136.

[6] *Wm. Dixon, Ltd.* v. *Jones, Heard & Ingram*, 1884, 11 R. 739.

[7] *Fisher* v. *Colquhoun*, 1844, 6 D. 1286.

[8] *Sellar* v. *Highland Rly. Co.*, 1919 S.C. (H.L.) 19.

[9] *Mackenzie* v. *Clark*, 1828, 7 S. 215 (Co-obligant on bills with party); *Tennent* v. *Macdonald*, 1836, 14 S. 976 (Partner of party); *M'Dougall* v. *Laird & Sons*, 1894, 22 R. 71 (Partner of party).

[10] *Buchan* v. *Melville*, 1902, 4 F. 620.

[11] *Dickson* v. *Grant*, 1870, 8 M. 566.

[12] *Peckholtz & Co.* v. *Russell*, 1899 (O.H.), 7 S.L.T. 135.

[13] *M'Lauchlan* v. *Brown & Morrison*, 1900 (O.H.), 8 S.L.T. 279.

[14] *Miller & Son* v. *Oliver & Boyd*, 1906, 8 F. 390, per L. Pres. Dunedin at p. 402, L. M'Laren at p. 403.

[15] Russell, Arbitration and Award, 11th ed., 185; *In re Stringer and Riley Brothers*, [1901] 1 Q.B. 105.

1113. It has been repeatedly held in construction contracts that the engineer or architect of one of the parties appointed arbiter under an arbitration clause in the contract is not disqualified by his employment or incidental adverse interest arising therefrom.[1] English decisions on this point are not applicable to Scotland ;[2] but in the latest case opinions were reserved in the House of Lords as to the competency of the engineer acting as arbiter where he would be both judge and witness.[3] This reservation, if it can be taken as implying that the arbiter could not so act, suggests a doubt whether some of the earlier cases may not have pressed the doctrine of waiver of the objection by signing the contract too far.[4] An engineer or architect may disqualify himself by being committed to an *ex parte* view,[5] but it must be clear that he is not going to approach the matter judicially before the objection will be sustained.[6]

Section 11.—The Oversman.

Subsection (1).—*His Appointment.*

1114. Where the submission is to two arbiters it might become abortive in the event of their failing to agree on a decision. The usual Scots practice is to provide for an ulterior tribunal, the oversman, whose jurisdiction is brought into operation in the event of the arbiters differing. The oversman may be appointed by the original deed, or his selection may be, and usually is, left to the arbiters. At common law arbiters have no implied power to nominate an oversman,[7] but by the Arbitration (Scotland) Act, 1894, they are now presumed to have such a power in common law submissions, unless the submission otherwise provides.[8] If they cannot agree, the Court makes the appointment. The arbiters,[9] when they have such a power, or the Court when the appointment falls to be made by it,[10] may competently appoint the oversman before the submission commences. In some statutory arbitrations this course is obligatory.[11] The selection of the oversman is a judicial act requiring the exercise of discretion, and is not properly performed by drawing lots,[12] unless all the names from whom the choice is made are agreed to be fit persons.[13] The power to select is not exhausted if the nominee

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[1] *Trowsdale* v. *N.B. Rly.*, 1864, 2 M. 1334 ; *Adams* v. *G.N.S. Rly.*, 1889, 16 R. 843 (affd. on other points, 18 R. (H.L.) 1) ; *Crawford Bros.* v. *Commrs. of Northern Lighthouses*, 1925 S.C. (H.L.) 22.

[2] *Crawford Bros.* v. *Commrs. of Northern Lighthouses*, 1925 S.C. (H.L.) 22, per L. Pres. Clyde at p. 25 ; cf. *Bristol Corporation* v. *Aird & Co.*, [1913] A.C. 241.

[3] *Crawford Bros., supra,* per L. Buckmaster at p. 31.

[4] *Scott* v. *Gerrard*, 1916 S.C. 793, per L. Salvesen at p. 807.

[5] *Aviemore Station Hotel Co.* v. *Scott*, 1904 (O.H.), 12 S.L.T. 494.

[6] *Halliday* v. *Duke of Hamilton's Trs.*, 1903, 5 F. 800.

[7] *Merry & Cunningham* v. *Brown*, 1860, 22 D. 1148 (affd. 1863, 1 M. (H.L.) 14).

[8] Arbitration (Scotland) Act, 1894 (57 & 58 Vict. c. 13), s. 4.

[9] *Brysson* v. *Mitchell*, 1823, 2 S. 382.

[10] *Glasgow P.C.* v. *United Collieries, Ltd.*, 1907 (O.H.), 15 S.L.T. 232.

[11] Lands Clauses Consolidation (Scotland) Act, 1845 (8 & 9 Vict. c. 19), s. 26.

[12] Bell on Arbitration, 2nd ed., p. 188, para. 347 ; *In re Cassell*, 1829, 9 B. & C. 624.

[13] *Smith* v. *Liverpool, London & Globe Insurance Co.*, 1887, 14 R. 931.

does not accept office. As regards disqualification, the oversman is in the same position as the arbiters.

Subsection (2).—*Devolution of the Submission on the Oversman.*

1115. The arbiters should in the first instance try to arrive at an agreed judgment; if they fail to agree they should then devolve the reference on the oversman. Devolution is in general performed by minute under the hands of the arbiters, which is sufficiently authenticated by their signatures.[1] The mere nomination of an oversman *in initialibus* does not operate as a devolution,[2] but where it is deferred until the difference has emerged and the appointment narrates this difference it may do so.[3] The fact that the oversman hears the evidence led before the arbiters neither invokes his jurisdiction nor invalidates proceedings.[4]

1116. Where the reference is to two arbiters and, in the event of their differing, to any one of them in conjunction with the oversman, a written devolution is not required where the award narrates the difference *in gremio*.[5] In farm valuations written devolution upon an oversman is not required where he is appointed in writing and the fact of the difference is established by parole evidence.[6] The difference between the arbiters may be as to merits or as to a fundamental point of procedure such as the necessity for proof[7] or the appointment of a clerk.[8]

Subsection (3).—*Partial Devolution.*

1117. Difficult questions may arise where the arbiters, in virtue of a power to pronounce part awards, agree on part of the matters referred and wish to devolve the remainder. They ought to issue their award on what they are agreed upon, and devolve the whole of the remainder on the oversman. If anything is left undecided and not devolved, the result may be fatal to the reference.[9] And while it is not incompetent for arbiters to make a partial devolution, retaining in their hands certain matters undecided, it is not convenient and may lead to complications.[10]

Section 12.—The Arbiter's Power to renounce Office.

1118. After accepting office the arbiter cannot resign at his pleasure;[11] and he may be ordered to proceed to issue a decree in such terms as may seem just to him.[12] An action for this purpose may be brought by one of the two parties suing alone.[13] The arbiter is not compelled to

[1] *Kirkaldy* v. *Dalgairn's Trs.*, 16th June 1809, F.C.
[2] *Brysson* v. *Mitchell*, 1823, 2 S. 382.
[3] *M'Nair's Trs.* v. *Roxburgh*, 1855, 17 D. 445.
[4] *Crawford* v. *Paterson*, 1858, 20 D. 488.
[5] *Middleton* v. *Chalmers*, 1721, Robertson's App. Ca., 391.
[6] *Gibson* v. *Fotheringham*, 1914 S.C. 987.
[7] *Sinclair* v. *Fraser*, 1884, 11 R. 1139.
[8] *Gibson* v. *Fotheringham*, *supra*.
[9] *Runciman* v. *Craigie*, 1831, 9 S. 629.
[10] *Lang* .v *Brown*, 1855, 2 Macq. 96; Bell on Arbitration, 2nd ed., pp. 200–202, notes.
[11] Bell on Arbitration, 2nd ed., p. 201, para. 377; Bankton i. 23, 5, and iv. 45, 132.
[12] *Marshall* v. *Edinburgh & Glasgow Rly.*, 1853, 15 D. 603.
[13] *Ibid.*

continue in office if he has a good excuse such as ill-health, intention to be absent abroad, or emerging interest.[1] The appropriate process is an action of declarator with conclusions *ad factum præstandum*. Where, without actually claiming the right to divest himself of office, the arbiter acts in such a way that the intervention of the Court to compel him to proceed is sought, procedure ought in general to be by way of action, but where the duty to act is clear, the Court may entertain application by way of summary petition.[2] Proceedings must be in the Court of Session.[3]

Section 13.—Procedure in Arbitrations; the Arbiter's Powers and Duties in relation thereto.

Subsection (1).—*Initiation of the Process.*

1119. In any but the most informal proceedings it is usual for the arbiter to signify his acceptance of office by a formal minute which is usually endorsed on the principal submission. If the reference is to two arbiters this is the appropriate stage at which to appoint an oversman. And if the case renders it desirable, the arbiter may also appoint a clerk to the reference, who will act as clerk of court and custodian of the process, and who is the appropriate channel of communication between the parties and the arbiter. In practice, where the arbiter is a layman and the clerk is a solicitor, the latter is often consulted by the arbiter on matters of law arising in the course of the submission. The clerk is responsible, under the arbiter's directions, for making known to the parties any orders pronounced by the arbiter.

Subsection (2).—*The Arbiter's Power to regulate Procedure.*

1120. In selecting an arbiter and defining his power, parties may agree on what special provisions they please as to how he is to conduct the arbitration, and the interpretation of any such contractual definitions is a matter of construction. But the grant of jurisdiction of necessity involves the grant of all powers necessary to explicate it.[4] The powers of the arbiter are correlative to his duties, and from the nature of his office his duties to the submitters are of the nature of those owed by judges to litigants.[5] The arbiter is bound (1) to ensure that he is properly informed of the question before him, (2) to expiscate such disputed facts as he considers relevant, and (3) to hear such argument as is necessary to enable him to do justice. In performing all these functions he is of necessity to do equal justice to both sides, and he may not grant to one side what he refuses to the other.[6] Subject to these general principles the arbiter is complete master of procedure, and

[1] *Marshall* v. *Edinburgh & Glasgow Rly.*, 1853, 13 D. 603; *Mackenzie* v. *Clark*, 1828, 7 S. 215.
[2] *Watson* v. *Robertson*, 1895, 22 R. 362. [3] *Forbes* v. *Underwood*, 1886, 13 R. 465.
[4] Ersk. Inst. i. 2, 8. [5] *Maule* v. *Maule*, 1814, 4 Dow 363, per L. C. Eldon.
[6] *Robson* v. *Menzies*, 1913 S.C. (J.) 90, per L. J.-Gen. Dunedin at p. 95 (A small debt appeal).

" there is no absolutely strict rule of pleading in a reference to an arbiter." [1] He may order written pleadings, but it is not necessary,[2] even although he is asked to do so.[3] He is entitled in some cases at least to exclude agents or counsel.[4] *A fortiori* he is master of all incidental procedure.[5] Procedure in arbitrations is very flexible, and a prejudicial plea may be raised at a very late stage.[6]

Subsection (3).—*Arbiter and Allowance of Proof.*

1121. In the conduct of the submission it is for the arbiter to say what proof is required and what evidence is competent. The fact that he errs in law in this connection is no ground for attacking his award. He may refuse a reference to oath,[7] or refuse proof altogether ; [8] even although he has allowed a proof he may proceed without it ; [9] and he may mistakenly exclude competent [10] or admit incompetent evidence.[11] The ratio of these cases is that the chance of the arbiter's error is a risk taken when the contract is entered into.

1122. But there are limits to the arbiter's powers. When he is deciding fact " the principles of natural justice require that before proceeding to decide it the arbiter shall receive from the parties all the evidence which can enable him to arrive at a proper or just conclusion." [12] In taking proof, as in other matters, the arbiter must do equal justice to both parties, and if he allow one party to lead evidence he must allow the other to do so,[13] unless he decide wholly in favour of the party whose proof is refused.[14]

1123. Where the arbiter is a man of skill and the matter in dispute is a practical question such as value or quality, proof may not only be unnecessary but even incompetent.[15] But where a man of skill wishes

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[1] *Christison's Tr.* v. *Callender-Brodie*, 1906, 8 F. 928, per L. Pres. Dunedin at p. 931.

[2] *Ledingham* v. *Elphinstone*, 1859, 22 D. 245, per L. J.-C. Inglis at p. 251.

[3] *Barr* v. *Macnaughton*, 1852, 15 D. 21, per L. Robertson, L.O., at p. 25.

[4] Bell, p. 164, para. 297 ; *Paterson* v. *Glasgow Corporation*, 1901, 3 F. (H.L.) 34, per L. Robertson at p. 40.

[5] *Paterson* v. *Glasgow Corporation, supra* ; *Holmes Oil Co.* v. *Pumpherston Oil Co.*, 1890, 17 R. 624 (affd. 1891, 18 R. (H.L.) 52), per L. Rutherfurd Clark at p. 656.

[6] *Christison's Tr.* v. *Callender-Brodie*, 1906, 8 F. 928.

[7] *Kirkaldy* v. *Dalgairn's Trs.*, 16th June 1809, F.C. ; *Mowbray* v. *Dickson*, 1848, 10 D. 1102, per L. J.-C. Hope at p. 1113.

[8] *Ledingham* v. *Elphinstone*, 1859, 22 D. 245.

[9] *Paterson* v. *Glasgow Corporation*, 1901, 3 F. (H.L.) 34.

[10] *Mowbray* v. *Dickson, supra*, per L. Moncreiff at p. 1122.

[11] *Alston* v. *Chappell*, 1839, 2 D. 248, per L. Moncreiff, L.O., at p. 252.

[12] *Holmes Oil Co.* v. *Pumpherston Oil Co.*, 1891, 18 R. (H.L.) 52, per L. Watson at p. 55 ; *Ledingham* v. *Elphinstone, supra*, per L. J.-C. Inglis at pp. 250, 251 ; *Mowbray* v. *Dickson, supra*, per L. J.-C. Hope at p. 1109 ; *Henderson* v. *M'Gown*, 1915 (O.H.), 2 S.L.T. 316.

[13] *Mitchell* v. *Cable*, 1848, 10 D. 1297.

[14] *Black* v. *John Williams & Co.*, 1924 S.C. (H.L.) 22.

[15] *Johnston* v. *Cheape*, 1817, 5 Dow 247 ; *N.B. Rly.* v. *Wilson*, 1911 S.C. 730, per L. Pres. Dunedin at p. 735 ; *Wm. Dixon, Ltd.* v. *Jones, Heard & Ingram*, 1884, 11 R. 739, per L.-Pres. Inglis at p. 744 (Quality) ; *Logan* v. *Loadbutter*, 1887, 15 R. 115 (Farm valuations) ; *Graham* v. *Mill*, 1904, 6 F. 886 (Farm valuations).

to inform himself of facts he can examine witnesses.[1] The absence of express power to take proof does not prevent [2] the arbiter taking proof any more than the presence of the power compels him to do so.[3] As he must act judicially he must give equal facilities to both sides,[4] and he should not examine witnesses in the presence of one party alone,[5] unless the objection is waived,[6] or unless he decides in favour of the absentee.[7] And the like applies to practical tests or inspections.[8]

1124. Even although proof is allowed the arbiter may circumduce the term ; and a party to whom full time has been allowed and who has not availed himself of it may be held as confessed.[9]

SUBSECTION (4).—*Attendance of Witnesses and Recovery of Documents.*

1125. To render the proof effective the arbiter must be able to ensure the attendance of witnesses and the production of documents. This is done by a petition at the instance of the party desiring the attendance of the witness or the production of writings. The petition is presented to the Court or to the Sheriff, and narrates the order for proof and craves a warrant for citation. Where documents are called for, the specification approved by the arbiter should be set out in the petition.[10] Where the witness is in England the Court confirms the appointment of the commissioner appointed by the arbiter. The commissioner's citation is enforced by the English Courts.[11]

SUBSECTION (5).—*Arbiter's Power to consult Men of Skill.*

1126. The arbiter as the selected judge may not delegate his authority.[12] But he can always, if asked, or *ex proprio motu*, take such skilled assistance as he thinks fit to inform his mind,[13] provided he forms his own judgment on the information provided.[14] But where in a statutory arbitration there is a provision for a stated case on law for the opinion of the Court, the arbiter is bound to accept the law as laid down by the Court.[15] At common law an arbiter has no power to state a case on a question of law.

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[1] *Cochrane* v. *Guthrie*, 1859, 21 D. 369.
[2] Bell on Arbitration, p. 150, para. 267.
[3] *Logan* v. *Leadbetter*, 1887, 15 R. 115 (Session papers).
[4] *Mitchell* v. *Cable*, 1848, 10 D. 1297.
[5] *Drew* v. *Drew*, 1855, 2 Macq. 1.
[6] *Ibid.*
[7] *Black* v. *John Williams & Co.*, 1924 S.C. (H.L.) 22.
[8] *Heggie & Co.* v. *Stark*, 1825, 3 S. 488 ; *Earl of Dunmore* v. *M'Inturner*, 1835, 13 S. 356 ; *M'Nair* v. *Roxburgh*, 1855, 17 D. 445, per L. Pres. M'Neill at p. 449.
[9] *Mitchell* v. *Cable*, 1848, 10 D. 1297, per L. Fullerton at p. 1308.
[10] *Crichton* v. *N.B. Rly.*, 1888, 15 R. 784.
[11] *John Nimmo & Son, Ltd.*, 1905, 8 F. 173.
[12] *Stark* v. *Thumb*, 1630, M. 6834 ; *Stewart* v. *Mercer*, 1709, M. 6836.
[13] *Caledonian Rly. Co.* v. *Lockhart*, 1860, 3 Macq. 808.
[14] *Mackenzie* v. *Girvan*, 1840, 3 D. 318.
[15] *Johnston's Trs.* v. *Glasgow Corporation*, 1912 S.C. 300, per L. Pres. Dunedin at p. 303 ; *Mitchell-Gill* v. *Buchan*, 1921 S.C. 390.

SUBSECTION (6).—*The Arbiter and hearing Parties.*

1127. Having the facts before him the arbiter should always give the fullest opportunity for hearing. But he is not bound to hear interminably.[1] Failure to hear at all, unless parties have waived their right, may be fatal to the award. It will always be so when the Court is satisfied that the arbiter could not properly discharge his duty without a hearing.[2] When one party has been heard the other must be,[3] unless the party not heard is completely successful.[4] In certain cases the arbiter may dispense with hearing just as he may dispense with proof. This is particularly the case where he is a man of skill and the facts are ascertainable by personal inspection.[5]

SUBSECTION (7).—*Arbiter's Power to proceed* ex parte.

1128. Where the circumstances warrant it an arbiter is entitled to proceed *ex parte*. Where a party to a submission is given ample opportunity to lead his proof and adequate notice of all diets of hearing, he must take advantage of his opportunities. If he does not do so he will not thereafter be heard to complain that the award was pronounced without his proof and without his case being heard ; he has himself to blame, and must take the consequences of his own neglect or contumacy.[6]

SUBSECTION (8).—*Informal References.*

1129. When the procedure contemplated is of an informal nature, the Court does not insist in niceties of procedure to the same extent as in a formal submission. The foregoing examples of the competency of a man of skill dispensing with proof or hearing when deciding a practical matter illustrate one aspect of the question.[7] So also in agricultural references " no formalities require to be observed by two farmers in valuing a crop or by a third who is competently called in to decide where they differ." [8] And in a mercantile arbitration an award by practical men, which on a strict view of procedure might have been open to criticism, but which was in conformity with local practice, was sustained.[9] In dealing with such an informal reference, more especially

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[1] *Brakinrig* v. *Menzies*, 1841, 4 D. 274, per L. Moncreiff at p. 286.
[2] *Langmuir* v. *Sloan*, 1840, 2 D. 877.
[3] *Sharpe* v. *Bickerdyke*, 1815, 3 Dow 102, per L. Eldon at p. 107.
[4] *Black* v. *John Williams & Co.*, 1924 S.C. (H.L.) 22.
[5] *Macgregor* v. *Stevenson*, 1847, 9 D. 1056 ; *Latta* v. *Macrae*, 1852, 14 D. 641 ; *N.B. Rly.* v. *Wilson*, 1911 S.C. 730.
[6] *Low* v. *Banks*, 1836, 14 S. 869 ; *Mitchell* v. *Cable*, 1848, 10 D. 1297, per L. Fullerton at p. 1308 ; *Cox Brothers* v. *Binning & Son*, 1867, 6 M. 161 ; *Wemyss* v. *Ardrossan Harbour Co.*, 1893, 20 R. 500.
[7] *Paterson* v. *Glasgow Corporation*, 1901, 3 F. (H.L.) 34.
[8] *Nivison* v. *Howat*, 1883, 11 R. 182, per L. Young at p. 191 ; *Gibson* v. *Fotheringham*, 1914 S.C. 987.
[9] *Hope* v. *Crookston Bros.*, 1890, 17 R. 868, as distinguished in *Davidson* v. *Logan*, 1908 S.C. 350, per L. Low at p. 368.

when parties have allowed it to " degenerate into a commission of their dispute to two friendly intermediaries or seconds with powers," it should be remembered that what passes between one arbiter and the party nominating him or his agent is not the act of the tribunal.[1]

Subsection (9).—*Proposed Findings or Notes.*

1130. Proof and argument having been heard, the usual procedure is to issue proposed findings ; but this is not essential,[2] and only in very special circumstances would a challenge on the ground of failure to issue proposed findings be entertained.[3] Proposed findings are of course tentative and subject to alteration. They cannot be challenged by reduction.[4]

Subsection (10).—*Expenses.*

1131. The submission usually confers power on the arbiter to award expenses, but this is pleonastic, as the power is inherent in the tribunal apart from special stipulation to the contrary. And failure by the arbiter to deal with expenses is not a ground for reducing his award as not having exhausted the submission.[5] Apparently the arbiter may pronounce decree in the name of the agent disburser if asked.[6] Expenses should be modified in the award and decerned for.

Section 14.—The Remuneration of the Arbiter and Clerk, etc.

Subsection (1).—*Arbiter's Remuneration.*

1132. The original rule was that " where an arbiter has not stipulated for remuneration before he has accepted the submission, he has no legal claim to be remunerated." [7] This rule was at one time almost absolute,[8] and only very special circumstances were held to justify an implied as distinct from a stipulated right to remuneration.[9] The harshness of the rule was recognised, and his " moral " right to remuneration was admitted. No objection was ever raised to an arbiter bargaining for a fee beforehand ; [10] though anything in the nature of bargaining for a fee where no fee had been agreed to be paid before delivering the award in a concluded submission was regarded with suspicion.[11] The law has developed in this matter, and the general rule cannot now be stated as absolutely as formerly.[12] In the most recent case the rule was laid down, " in accordance with general practice the

[1] *Pollich* v. *Heatley*, 1910 S.C. 469, per L. Pres. Dunedin at p. 481.
[2] *Johnston* v. *Cheape*, 1817, 5 Dow, 247 ; *M'Callum* v. *Robertson*, 1826, 2 W. & S. 344.
[3] *Baxter* v. *Macarthur*, 1836, 14 S. 549.
[4] *Wemyss* v. *Ardrossan Harbour Co.*, 1893, 20 R. 500.
[5] *Pollich* v. *Heatley*, 1910 S.C. 469. [6] *Hood* v. *Baillie*, 1832, 11 S. 207.
[7] Bell on Arbitration, 2nd ed., p. 312, para. 628.
[8] *Kennedy* v. *Kennedy*, 20th Jan. 1819, F.C.
[9] *MacCallum* v. *Lawrie*, 26th June 1810, F.C.
[10] *Fraser* v. *Wright*, 1838, 16 S. 1049, per L. Medwyn.
[11] *Duff* v. *Pirie*, 1893, 21 R. 80.
[12] *Murray* v. *N.B. Rly.*, 1900, 2 F. 460, per L. Trayner at p. 464 (A statutory arbitration).

rule must now be assumed that a professional man undertaking the duties of an arbiter is entitled, in the absence of any agreement to the contrary, to be remunerated for his services as arbiter in the same way as he is entitled to receive remuneration for his services in any other professional employment." [1]

Subsection (2).—*Fees of Clerk and Men of Skill.*

1133. The clerk is the "officer" of the arbiter. He has a legal right to his fees for work done, for which the parties are jointly and severally liable to him whatever may be the right of relief *inter se*.[2] And his right to remuneration persists though the submission fall.[3] In practice the liability for the clerk's fees is dealt with in the award. The same principles would hold with regard to the liability of the parties for the fees of men of skill whose assistance the arbiter had requested and obtained.[4]

Section 15.—The Award.

Subsection (1).—*General Requisites.*

1134. The purpose of an arbitration is to procure a valid award. Accordingly, in form and substance it must conform to the contract of submission, both as to its scope and as to the procedure which has given birth to it. [5] The more usual forms of award are to be found in the style books.[6] An award following on a probative submission must be probative [7] or holograph.[8] But an opinion of counsel,[9] an award executed in England by an arbiter in a Scots arbitration which is well authenticated by English law,[10] or an informal award *in re mercatoria* [11] have all been upheld though improbative, their genuineness not being in dispute. As the final judgment by the issue of which the arbiters become *functi*, an award must not reserve any arbitral duty to be exercised after its issue, but it may leave a ministerial act such as the taxation of expenses to be performed thereafter.

Subsection (2).—*Alternative Award.*

1135. It is competent for the arbiter to pronounce an alternative award subject to the subsequent determination by the Court of a matter not finally referred to him. The framing of such an award requires great care.[12]

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[1] *Macintyre Bros.* v. *Smith*, 1913 S.C. 129, per L. Kinnear at p. 132.

[2] Bell on Arbitration, 2nd ed., p. 292, para. 575; *Macfarlane* v. *Black*, 1842, 4 D. 1459, per L. Cunningham, L.O.

[3] *Macfarlane* v. *Black*, *supra*. [4] Bell on Arbitration, 2nd ed., p. 226, para. 420.

[5] Challenge of awards, *infra*, Section 19.

[6] Juridical Styles, vol. ii. p. 1118; Scots Styles, vol. i. p. 329.

[7] *Percy* v. *Meikle*, 25th Nov. 1808, F.C. [8] *Williamson* v. *Williamson*, 1742, M. 16933.

[9] *Fraser* v. *Lord Lovat*, 1850, 7 Bell's App. 171.

[10] *Earl of Hopetoun* v. *Scots Mines Co.*, 1856, 18 D. 739.

[11] *Dykes* v. *Roy*, 1869, 7 M. 357; *Hope* v. *Crookston Bros.*, 1890, 17 R. 868.

[12] *Fleming* v. *Middle Ward of Lanarkshire D.C.*, 1895, 23 R. 98; *Caledonian Rly. Co.* v. *Turcan*, 1898, 25 R. (H.L.) 7; *Glendinning* v. *Board of Agriculture*, 1918 S.C. (H.L.) 56.

SUBSECTION (3).—*Interim and Part Awards.*

1136. Power is frequently conferred *per expressum* on the arbiter to issue interim awards. Whether he could do so in general without such express authority has been agitated but not decided.[1] So also he may have power given him to pronounce part awards. But while interim awards are tentative and subject to alteration, part awards are final as regards the matters with which they deal.[2] In either case the nature of the interim or part award should appear on the face of it; and the final award must be so framed as to keep in view the situation resulting from the previous issue of the interim or partial decrees. An interim award may become final by the expiry of the submission without the issue of a valid final award.[3]

SUBSECTION (4).—*Rectification of Award.*

1137. An error of judgment cannot be corrected after the award is issued. But a clerical error,[4] or *error calculi*,[5] may apparently be rectified.

SUBSECTION (5).—*Delivery of Award.*

1138. As the award is the final judgment of the tribunal, all notes and proposed findings are inherently subject to variation and recall. And no award is final until completely beyond the arbiter's control by delivery or registration, even although it be in the form of a final decree.[6] Even a signed award in the hands of the clerk may be altered if no authority has been given for its issue to parties;[7] and a delivered improbative award may be recalled and a properly executed award substituted therefor, provided the submission has not expired.[8] But delivery to the clerk with directions to transmit to the parties is delivery to them.[9] And delivery to the clerk coupled with the expiry of the submission makes an award irrevocable.[10]

SECTION 16.—ENFORCEMENT OF THE CONTRACT OF ARBITRATION.

SUBSECTION (1).—*Against the Arbiter.*

1139. The Court may be called upon to enforce the contract against the arbiter. Once he has accepted office, he is bound in general to proceed, and may be compelled to do so by appropriate process.[11]

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[1] *Lyle* v. *Falconer*, 1842, 5 D. 236.
[2] *Edinburgh & Glasgow Rly. Co.* v. *Hill*, 1840, 2 D. 486.
[3] *Mackessock* v. *Drew*, 1822, 2 S. 13.
[4] Bell, p. 256, para. 489; *Macbryde* v. *Macrae's Exrs.*, 1748, M. 657.
[5] Bell, p. 257, para. 490; *Kerr* v. *Bremner*, 1835, 14 S. 180.
[6] *Robertson* v. *Ramsay*, 1783, Hailes, 912, per L. Braxfield.
[7] *Macnair* v. *Gray*, 1831, 5 W. & S. 305.
[8] *Bannatyne* v. *Gibson & Clark*, 1862, 1 M. 90.
[9] *M'Quaker* v. *Phœnix Assurance Co.*, 1859, 21 D. 794.
[10] *Simpson* v. *Strachan*, 1736, M. 17007; Elch. Arb. 2.
[11] See *ante*, para. 1118 (Arbiter's power to renounce office).

SUBSECTION (2).—*Against the Parties.*

1140. Where there is a contract to submit, but parties are unable to agree upon an arbiter, the Court in common law submissions may select one.[1]

1141. The usual form in which the jurisdiction of the Court is invoked to enforce a contract to submit is where such a contract is pleaded by way of defence to an action as taking the dispute out of the Court's cognisance. Whether and to what extent this defence is well founded is a matter of construction. But once the plea is taken, if it be established that the question in the case is referred to arbitration, then the Court has no dispensing power. "If the parties have contracted to arbitrate, to arbitration they must go."[2] But where the relations of parties are regulated by a code of rules, and these rules prescribe arbitration as a mode of settling disputes provided that "both parties bind themselves in writing to agree to the decision," this latter requirement is a condition precedent to the arbitration clause being effective.[3]

1142. Whatever may have been the earlier practice, it is now settled that the correct form of plea in general is that the action should be sisted pending the determination of the dispute by arbitration.[4] "The jurisdiction of the Court is not wholly ousted by such a contract." Standing the arbitration clause, the Court has no jurisdiction to entertain the merits of the dispute, but it has jurisdiction to pronounce decree conform to the award. If the submission prove abortive, the Court's jurisdiction on the merits revives.[5]

1143. But the contract may be so framed that no action will lie unless and until the question has been determined by arbitration. If, as is very often the case in insurance policies, it is provided that the liquidation of a sum due under the contract by arbitration is a condition precedent to maintaining an action in Court, then unless such an award exists, the defender falls to be assoilzied, there being no obligation on which he may be sued.[6]

1144. In some cases the questions in dispute fall to be decided in part by the Court and in part by an arbiter. Whether the action is allowed to proceed, under reservation of the right to sist procedure if any matter requiring to be determined by the arbiter should emerge, or whether the arbiter is called on to exercise his jurisdiction in the first instance, proceedings in the action being meantime sisted, depends on considerations of practical convenience.[7]

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[1] See *ante*, paras. 1108, 1109 (Arbitration (Scotland) Act, 1894).
[2] *Sanderson* v. *Armour*, 1922 S.C. (H.L.) 117, per L. Dunedin at p. 126.
[3] *Drennan* v. *Assoc. Ironmoulders of Scotland*, 1921 S.C. 151.
[4] *Wilson & M'Farlane* v. *Stewart & Co.*, 1898, 25 R. 655.
[5] *Hamlyn & Co.* v. *Talisker Distillery Co.*, 1894, 21 R. (H.L.) 21, per L. Watson at p. 25.
[6] *Gilmour* v. *Caledonian Insurance Co.*, 1893, 20 R. (H.L.) 13.
[7] *Barr* v. *Commrs. of Queensferry*, 1899, 1 F. 630.

Section 17.—Interference by the Court with a going Arbitration.

1145. Where during the currency of an arbitration it is plain *ex facie* of the proceedings that an arbiter is called on to exercise powers which he does not possess, it is competent to apply for interdict against him ; and this will be granted in appropriate circumstances. But it is only in cases where the arbiter has clearly no jurisdiction to act,[1] or where there is no question to try,[2] that interdict will be granted. The Court is reluctant to interfere, whether the arbitration be statutory [3] or at common law.[4] Even although there may be reasonable ground to hold that some matters which have been raised before the arbiter are not within the submission, the Court will not assume that the arbiter will act *ultra vires*, and if there are matters which clearly fall under the submission, the Court will not interfere *ab ante*.[5] Similarly the Court has refused to interfere by way of interdict and reduction with the action of an arbiter whose proposed findings were challenged, on the ground that the complainers remedy was to appeal to the arbiter, who would, it was presumed, do justice.[6] Probably interdict is competent where a step has been taken at an early stage which would vitiate an award if made.[7] And it is a remedy open where an arbiter is disqualified ; [8] but in that case there must be a pending dispute ; it will not be granted in anticipation.[9]

Section 18.—Enforcement of Award.

1146. A valid award affords a plea of *res judicata* on the matter in dispute.[10] Where a formal award is contemplated there may be inserted in the submission a consent to registration of the award for execution. This consent must be that of the submitters,[11] and if not contained in the submission may be warranted by subsequent probative agreement.[12] In such a case the award is enforceable by summary diligence in common form, and questions arising as to the due execution thereof are matters of diligence law. Should there be no consent to registration the award may be enforced by action for decree conform.[13]

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[1] *G. & S.W. Rly. Co.* v. *Caledonian Rly. Co.*, 1871, 44 S.J. 29 ; *Sinclair* v. *Clyne's Tr.*, 1887, 15 R. 185.

[2] *Par. Bd. of Greenock* v. *Coghill & Son*, 1878, 5 R. 732 ; cf. *Woods* v. *Co-operative Insurance Co.*, 1924 S.C. 692.

[3] *Dumbarton Water Commrs.* v. *Lord Blantyre*, 1884, 12 R. 115.

[4] *Licenses Insurance Corp.* v. *W. & R. B. Shearer*, 1907 S.C. 10.

[5] *Bennets* v. *Bennet*, 1903, 5 F. 376 ; *Moore* v. *M'Cosh*, 1903, 5 F. 946.

[6] *Wemyss* v. *Ardrossan Harbour Co.*, 1893, 20 R. 500.

[7] *Birkmyre Bros.* v. *Moore & Weinberg*, 1906 (O.H.), 14 S.L.T. 702.

[8] *Mags. of Edinburgh* v. *Lownie*, 1903, 5 F. 711 ; see *ante*, paras. 1111–1113.

[9] *Caledonian Rly. Co.* v. *Mags. of Glasgow*, 1897, 25 R. 74.

[10] *Fraser* v. *L. Lovat*, 1850, 7 Bell's App. 171.

[11] *Knox* v. *Hume*, 1707, M. 625.

[12] *Baillie* v. *Pollock*, 1829, 7 S. 619.

[13] Bell on Arbitration, 2nd ed., p. 357, para. 742

Section 19.—Challenge of an Award.

Subsection (1).—*Form of Challenge.*

1147. The usual form of challenge of an award is an action of reduction which is only competent in the Court of Session. It has been held in the Outer House, and acquiesced in, that under the provisions of the Sheriff Courts (Scotland) Act, 1877,[1] it was competent to set aside an award *ope exceptionis* in the Sheriff Court.[2] There is a corresponding provision in the present Sheriff Court Act,[1] and the terms of the Codifying Act of Sederunt relative to procedure in the Court of Session [3] echo it.

Subsection (2).—*Grounds of Challenge.*

I. *General Principle.*

1148. The law of Scotland does not admit of the award of an arbiter being reviewed by the Court on its merits. But as the authority of the award is based on the contract of submission, no award is binding which is not pronounced in accordance with that contract. There is involved in this more than a mere formal adherence to the limitations of jurisdiction imposed by the submission. The conduct of the process both by parties and arbiter is inherently subject to all the implied conditions essential to the conduct of judicial proceedings as they are understood by our Courts. When the award is not a due implement of the express and implied conditions of the contract it will be set aside.[4]

II. *Act of Regulations*, 1695.

1149. Awards were at one time apparently reviewed by the Courts on their merits. Since the passing of the Articles of Regulations of 1695 this has been incompetent. When an award is clear in its terms, correct in its form, embracing nothing which was not referred, and exhausting all that was referred, it cannot be reviewed on its general merits, whether it be an ordinary or a judicial reference.[5] Under the 25th section of the Articles of Regulations, an enactment which has the force of statute, the grounds of reduction are limited to corruption, bribery, or falsehood. There is a considerable body of authority on the meaning of the word corruption in this connection, in which it was sought to give an extended meaning to the term, and there were references to "legal" or "constructive" corruption.[6] These extended definitions were held to justify the Court's interference with awards

[1] Sheriff Courts (Scotland) Act, 1877 (40 & 41 Vict. c. 50), s. 11; Sheriff Courts (Scotland) Act, 1907 (7 Edw. VII. c. 51), Sched. 1, rule 50.

[2] *Nivison* v. *Howat*, 1883, 11 R. 182, per L. Lee at p. 189.

[3] C.A.S., C, iv. 4 (*d*); but see Maclaren on Court of Session Procedure, pp. 679–682, and *Donald* v. *Donald*, 1913 S.C. 274.

[4] *Holmes Oil Co.* v. *Pumpherston Oil Co.*, 1891, 18 R. (H.L.) 52, per L. Watson at p. 55.

[5] *Mackenzie* v. *Girvan*, 1840, 3 D. 318; affd. 2 Bell's App. 43.

[6] *Mitchell* v. *Cable*, 1848, 10 D. 1297; *Miller* v. *Millar*, 1855, 17 D. 689.

where there was nothing of the nature of moral wrong in the arbiter's action.[1] It is now definitely laid down that corruption must be actual, and that "legal corruption" is meaningless.[2] But it does not follow that all the earlier judgments in which the term is employed are unsound although the true ratio of the decision may have been included in a wrong category.[3] The law laid down in *Adams* v. *G.N.S. Rly.* has swept all the decisions relating to refusal of proof, refusal to hear, &c., which were formerly held to be illustrative of "legal corruption," into their true category—breach of an implied condition of the contract. Authority on literal corruption is almost completely wanting. It has, however, been held that it is not corruption for an arbiter to apply successively to both parties for a loan of money.[4] Perhaps an arbiter who accepts a submission on the footing of acting gratuitously, and thereafter demands a fee prior to giving out his award is open to the charge.[5]

1150. The term bribery is so plain that no interpretation is required. A gratuitous assignation accepted by an arbiter pending a submission was fatal to the award ;[6] and the acceptance of hospitality may give grounds for criticism.[7]

1151. There is little definite authority on the meaning of the terms "falsehood." It would appear to be immaterial whether it be limited to the case of a forged submission or award as suggested in one case,[8] or extended to cases where the award contains a concocted narrative of proceedings.[9] This latter, if not reducible under the Articles, could be challenged at common law.

III. *Reduction at Common Law.*

1152. Whatever doubts the apparently exhaustive enumeration of grounds of reduction in the Articles of Regulation may have raised, it has long been settled that an award can be reduced at common law on grounds other than those set forth in the Articles. The challenge may be based on either (*a*) the award being *ultra fines compromissi*, or (*b*) the disregard of some of the essential though implied conditions of the contract.[10]

1153. *Ultra fines compromissi.*—Where the award purports to decide a matter not submitted either by express contract or by unequivocal

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[1] *Alexander* v. *Bridge of Allan Water Co.*, 1869, 7 M. 492.
[2] *Adams* v. *G.N.S. Rly.*, 1890, 18 R. (H.L.) 1, per L. Watson at p. 8, L. Bramwell at p. 10.
[3] *Adams, supra*, per L. Watson at p. 9 ; *Robson* v. *Menzies*, 1913 S.C. (J.) 90, per L. J.-Gen. Dunedin at pp. 94–95.
[4] *Morisons* v. *Thomson's Trs.*, 1880, 8 R. 147.
[5] *Duff* v. *Pirie*, 1893, 21 R. 80, per L. O. Kyllachy at p. 85 ; but see L. Pres. Robertson at p. 88.
[6] *Mitchell* v. *Fulton*, 1715, M. 663.
[7] *In re Hopper*, 1867, L.R. 2 Q.B. 367 ; *Mosely* v. *Simpson*, 1873, L.R. 16 Eq. 226.
[8] *Hardie* v. *Hardie*, 1724, M. 664.
[9] *Blain* v. *Crawford*, n.r., referred to in Session Papers in *Hetherington* v. *Carlyle*, 21st June 1771, F.C.
[10] *Adams* v. *G.N.S. Rly.*, 1890, 18 R. (H.L.) 1, per L. Watson at p. 8.

actings, it is not an award which the submitters are bound to implement, and so is reducible. Thus, where an arbiter pronounced a joint and several decree without having power to do so,[1] where under a construction contract the arbiter awarded more than the contract price,[2] or where, being directed to value certain heritable property, he refused to do so, basing his refusal on a question of title not referred to him,[3] the awards were set aside. And proof was allowed of an averment that an arbiter in assessing compensation under a statute had included items which could not legally be claimed.[4]

1154. *Misconduct of Arbiter.*—In the conduct of a submission an arbiter must "conform to all those rules for securing the proper administration of justice which the law implies in the case of every proceeding before an arbiter, as well as in the case of every proceeding before a court of justice."[5] This involves that where proof is necessary, proof shall be taken, and where hearing is necessary, hearing must be allowed. But the obligation to hear and the obligation to take proof are not absolute. Each case depends on its own facts.[6] Reduction on the ground of failure to comply with these implied conditions has often been brought but seldom successfully. To succeed, the pursuer must establish some such deviation from the ordinary methods of doing justice between parties in dispute as would be fatal to a decree of the Small Debt Court.[7] If the arbiter has virtually driven one of the parties from the judgment seat his award will not stand. The usual ground is failure to hear parties or failure to take proof. The older cases deal with those matters from the standpoint of "constructive corruption."[8] But although the grounds of judgment and the opinions expressed in these cases may refer to a wrong legal category, dicta in them relating to the plea of "constructive corruption" may be applicable to failure to implement the implied condition that the arbiter shall so conduct the proceedings as not to violate the fundamental canons of judicial procedure. Actions of reduction have succeeded where the arbiter in effect allowed one side a proof which he denied to the other,[9] and where he decided disputed facts without a proof at all.[10] Hearing one side without hearing the other would be a good ground of reduction.[11] And in statutory proceedings refusal to allow a party interested, who had not known of the dependence of the arbitration until it was almost concluded, either to tender written pleadings or to have an opportunity to inform himself as to what had previously taken place was fatal to the award.[12] There

[1] *Carruthers* v. *Hall*, 1830, 9 S. 66.
[2] *Napier* v. *Wood*, 1844, 7 D. 166.
[3] *Alexander* v. *Bridge of Allan Water Co.*, 1869, 7 M. 492.
[4] *Glasgow City & District Rly.* v. *Macgeorge, Cowan & Galloway*, 1886, 13 R. 609.
[5] *Holmes Oil Co.* v. *Pumpherston Oil Co.*, 1891, 18 R. (H.L.) 52, per L. Watson at p. 55.
[6] See *ante*, paras. 1121–1124.
[7] *Robson* v. *Menzies*, 1913 S.C. (J.) 90, per L. J.-Gen. Dunedin at p. 95.
[8] See *ante*, para. 1149.
[9] *Mitchell* v. *Cable*, 1848, 10 D. 1297.
[10] *Henderson* v. *M'Gown*, 1915 (O.H.), 2 S.L.T. 316.
[11] *Sharpe* v. *Bickerdyke*, 1815, 3 Dow, 102.
[12] *Lanarkshire & Dumbarton Rly.* v. *Main*, 1894, 21 R. 1018.

have been two recent cases in the Outer House where failure to receive a claim tendered and failure to consider the whole process, contrary to the express agreement of parties, were held good grounds of reduction.[1] In a statutory arbitration where provision is made for a stated case to the Court on a question of law, the arbiter must give effect to the law laid down by the Court or his award will be set aside.[2]

1155. *Fraud or Improper Agency.*—Where an award has been procured by a demonstrably concocted case it may be set aside.[3] Even improper agency on the part of a solicitor, resulting in the arbiter being deceived, has been held a ground of reduction.[4] The limits within which perjury and fraud are grounds for setting aside judgments of the Court have recently been considered, and similar principles would apply to the decree of an arbiter.[5]

1156. *The Alleged Award not an Award at all.*—Where an agreement between parties is disguised as an award, it has not the protection afforded by the law to awards.[6] And an auditor's certificate, though declared to be final and binding between partners, was opened up when it emerged that the auditor was not aware when granting the certificate that he was acting as arbiter.[7]

1157. *Award not Exhaustive.*—An award which does not exhaust the submission by dealing with the whole subject-matter of the reference is not valid at all, even although it is a good exercise of the arbiter's powers as far as it goes. It falls to be wholly set aside,[8] unless the submission provides for the issue of part awards.

Subsection (3).—*Partial Reduction.*

1158. It has long been settled that where an award deals in part with matters outwith the reference it is competent to reduce that part which is invalid and leave the remainder standing.[9] This involves of necessity that the good and bad portions of the award are separable.[10] If they are not separable the whole award must be set aside.[11]

Subsection (4).—*Evidence Admissible in Action of Reduction.*

1159. As in general an action of reduction turns on disputed facts, these fall to be proved according to the usual rules. Arbiters' notes may be used to prove the *res gestæ* of the submission, but not to attack

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[1] *Field & Allan* v. *Lownie*, 1909, 2 S.L.T. 317; *Drummond* v. *Martin*, 1906, 14 S.L.T. 365.
[2] *Mitchell-Gill* v. *Buchan*, 1921 S.C. 390.
[3] *Logan* v. *Lang*, 1798, M. Appx. Arb. 6.
[4] *Calder* v. *Gordon*, 1837, 15 S. 463.
[5] *M'Carrol* v. *M'Kinstery*, 1924 S.C. 396 (rev. 1925, S.L.T. 641); *Mackintosh's Tr.* v. *Stewart's Tr.*, 1906, 8 F. 467.
[6] *Maule* v. *Maule*, 1814, 4 Dow, 391.
[7] *Teacher* v. *Calder*, 1899, 1 F. (H.L.) 39.
[8] *Pollich* v. *Heatley*, 1910 S.C. 469, per L. Pres. Dunedin at p. 482.
[9] *Crawford* v. *Hamilton*, 1702, M. 6835; *Johnston* v. *Cheape*, 1817, 5 Dow, 247.
[10] *Cox Bros.* v. *Binning & Son*, 1867, 6 M. 161.
[11] *Miller & Son* v. *Oliver & Boyd*, 1903, 6 F. 77.

the award on its merits.[1] If, however, the arbiter has incorporated the notes in his award either directly or by reference, they can be used as the formal award itself can.[2] The award as a written document must speak for itself, and it is incompetent to ask an arbiter to interpret his award. But the arbiter can be and often is examined as a witness. When under examination, it is competent to ascertain from him what he decided, as *e.g.* what elements of damage are included in a sum awarded, but it is incompetent to examine him as to the grounds of his judgment.[3]

Section 20.—Judicial Reference.[4]

1160. Parties to a pending litigation may refer the whole or any part of the cause to a referee. The reference is made in the course of the process by a minute signed by counsel or the parties to which the Court interpones authority. When the interlocutor is signed, the contract is irrevocable,[5] but until then it is open to either to resile,[6] unless matters have got so far as a hearing before the referee without objection taken.[7]

1161. In most of its legal attributes a judicial reference is substantially the same as an ordinary contract of submission. The award is protected by the Act of Regulations from challenge except on grounds which would be relevant in the case of an ordinary award,[8] and the principal differences are in matters of procedure.

1162. The limits of a judicial reference are defined by the record in the cause and the minute of reference. But the referee has not the power to allow the dispute to be extended by amending the record as the Court would have if it were dealing with the case.[9] Like an arbiter he has a wide discretion in dealing with proof or hearing, subject always to the rules which limit the arbiter's powers in those connections.[10] Incidental applications for warrant to cite witnesses, etc., are made to the Lord Ordinary before whom the cause depends.

1163. After the referee has come to his decision, he gives his award in the form of a report to the Court. To this report the authority of the Court has to be interponed before it is binding. The referee is not *functus* by making the report as an arbiter is by his award, and it can be remitted for alteration.[11] When the report comes up for approval, it is open to either party to challenge it on grounds which would found an action of reduction of an ordinary award.[12] A separate action of reduction is not necessary.[13]

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[1] *Wauchope* v. *Edinburgh & Dalkeith Rly. Co.*, 1846, 8 D. 816.
[2] *Mackenzie* v. *Girvan*, 1843, 2 Bell's App. 43.
[3] *Duke of Buccleuch* v. *Metropolitan Board of Works*, L.R. 1872, 5 E. & I. App. 418; *Glasgow City & District Rly.* v. *Macgeorge, Cowan & Galloway*, 1886, 13 R. 669.
[4] Maclaren on Court of Session Procedure, chap. xiv.
[5] *Walker & Co.* v. *Shaw Stewart*, 1855, 2 Macq. 424, per L. C. Cranworth at pp. 429, 430.
[6] *Reid* v. *Henderson*, 1841, 3 D. 1102. [7] *Fairley* v. *M'Gown*, 1836, 14 S. 470.
[8] *Mackenzie* v. *Girvan*, 1840, 3 D. 318 (affd. 1843, 2 Bell's App. 43).
[9] *Brown's Trs.* v. *Horne*, 1907 S.C. 1027.
[10] *Campbell* v. *Campbell*, 1843, 5 D. 530, per L. J.-C. Hope at pp. 538, 539.
[11] *Ld. Adv.* v. *Heddle*, 1856, 18 D. 1211. [12] See *ante*, Section 19 (Challenge of awards).
[13] *Mackenzie* v. *Girvan*, 1840, 3 D. 318, per L. Moncreiff at p. 327.

1164. A judicial reference subsists as long as the cause depends. If the action falls, so does the reference.[1] It does not fall by death of party,[2] but it does fall by death of the referee without issuing an award.[3]

1165. The referee can deal with expenses[4] if not prevented by the terms of the reference. As officers of Court, he and his clerk are entitled to remuneration which is part of the expenses of the reference.[5]

Section 21.—Homologation.

1166. As in other contracts, unequivocal actings may infer consent, either to be bound by a contract otherwise insufficiently evidenced, or to agree to proceedings otherwise open to challenge. "There are few if any defects in the formal procedure under a submission which may not be cured by homologation."[6] Improbative submissions,[7] and even in one case a submission relating to heritage which one of the parties had not signed at all,[8] have been held binding by reason of parties appearing to plead before the arbiter without objection. So also where the arbiter did not sign a formal minute of acceptance,[9] or where parties omitted to have the Court's authority interponed to a minute judicially referring a case,[10] the right to challenge was held to have been passed from by appearance before the arbiter. On the same principle the lack of timeous prorogation was supplied by actings of the parties.[11]

1167. The contract of submission can be interpreted,[12] or even have its scope extended, by the conduct of the process by the submitters.[13] And the right to challenge an award is lost if the challenger has acted upon it.[14]

1168. Where in the course of a submission the arbiter has been guilty of some irregularity of procedure, such as examining witnesses in the presence of one party alone, which would have led to reduction of the award if not homologated, continued appearance before the arbiter without objection prevents the party aggrieved from afterwards founding on the irregularity.[15] And the right to complain of improper conduct of the arbiter in bargaining about his fee is passed from if the fee is paid without protest.[16] If a formal protest is tabled, continued appearance thereafter before the arbiter does not form ground for a plea of homologation.[17]

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[1] *Gillon* v. *Simpson*, 1859, 21 D. 243.
[2] *Watmore* v. *Burns*, 1839, 1 D. 743.
[3] *Walker & Co.* v. *Shaw Stewart*, 1855, 1 Paterson, App. 450, per L. C. Cranworth at p. 453.
[4] *Fairley* v. *M'Gown*, 1836, 14 S. 470.
[5] *Henderson* v. *Paul*, 1867, 5 M. 628, per L. Neaves at p. 633; *Beattie*, 1873, 11 M. 954.
[6] Bell, p. 319, para. 648.
[7] *Telfer* v. *Hamilton*, 1735, M. 5657; *Elgin Lunacy Board* v. *Bremner & Elder*, 1874, 1 R. 1155, per L. Ormidale at p. 1165.
[8] *Brown* v. *Gardner*, 1739, M. 5659.
[9] *Gardner* v. *Ewing*, 1773, M. 659.
[10] *Fairley* v. *M'Gown*, *supra*.
[11] *Paul* v. *Henderson*, 1867, 5 M. 613.
[12] *Orrell* v. *Orrell*, 1859, 21 D. 554.
[13] *Miller & Son* v. *Oliver & Boyd*, 1903, 6 F. 77; but see *Miller & Son* v. *Oliver & Boyd*, 1906, 8 F. 390, observations of L. Pres. Dunedin at p. 402.
[14] *Montgomery* v. *Semple*, 1566, M. 5619.
[15] *Drew* v. *Drew*, 1855, 2 Macq. 1.
[16] *Duff* v. *Pirie*, 1893, 21 R. 80.
[17] *Miller & Son* v. *Oliver & Boyd*, 1906, 8 F. 390, per L. Pres. Dunedin at p. 402.

1169. To make out a case of homologation there must have been knowledge of the facts which would otherwise have been the basis of challenge. But in relation to steps in process, such as lack of timeous prorogation, this knowledge is inferred from continued participation in the proceedings.[1]

Section 22.—Statutory Arbitrations.

1170. In many Acts of Parliament provision is made for the settlement by arbitration of questions, the emergence of which is contemplated as a result of the operation of the statute. The Lands Clauses (Scotland) Act of 1845[2] and the Agricultural Holdings (Scotland) Act of 1923[3] are two of the best known examples. In general where a statutory arbitration is provided for, the statute itself gives a more or less detailed code of procedure regulating the method of selecting the tribunal, the conduct of proceedings, the endurance of the arbitration, and the like.[4] Except in so far as they may be modified in the statute, the powers, rights, and duties of the arbiter are the same as those of an arbiter under a common law submission. And the award is equally protected from review on its merits. In practice many arbitrations under the Lands Clauses (Scotland) Act and similar statutes are conducted with a degree of formality approaching that of proceedings in Court.

1171. Where an arbitration depends wholly on statute, parties and arbiters must conform to the statutory code.[5] But it is not incompetent to frame a submission which may have its origin in questions arising under a statute so as to embrace incidents and import powers not included in a reference proceeding simply on the statutory clauses.[6] Where, as in the case of the compulsory acquisition of land from an heir of entail, one of the parties is only *in titulo* to arbitrate in the exercise of a statutory power, a doubt has been expressed as to whether he can deviate from the exact statutory code, and an opinion has been given that if it is competent it must be done in terms.[7] The question whether an heir of entail can prorogate a statutory submission so as to prolong its endurance outside the statutory limit was reserved in the House of Lords as not raised on the pleadings where the matter was brought up :[8] but as regards absolute proprietors the power of prorogation in a statutory submission is clear.[9]

1172. In such arbitrations the jurisdiction of the arbiter is defined by the statute out of which the arbitration springs, and if it appears that

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[1] *Paul* v. *Henderson*, 1867, 5 M. 613, per L. Cowan at p. 622.
[2] Lands Clauses (Scotland) Act, 1845 (8 & 9 Vict. c. 19).
[3] Agricultural Holdings (Scotland) Act, 1923 (13 & 14 Geo. V. c. 10).
[4] Lands Clauses (Scotland) Act, 1845 (8 & 9 Vict. c. 19), s. 23 *et seqq.*; Agricultural Holdings (Scotland) Act, 1923 (13 & 14 Geo. V. c. 10), s. 16, Sched. 2.
[5] *Glasgow, Barrhead & Neilston Rly. Co.* v. *Nitshill Coal Co.*, 1850, 7 Bell's App. 325.
[6] *Caledonian Rly. Co.* v. *Lockhart*, 1860, 3 Macq. 808, per L. Cranworth at p. 817.
[7] *Mackenzie* v. *Inverness & Aberdeen Rly.*, 1866, 4 M. 810, per L. Ardmillan at p. 818.
[8] *Caledonian Rly. Co.* v. *Lockhart*, *supra*, per L. C. Campbell at p. 813.
[9] *Ibid.*, per L. Wensleydale at p. 823.

the arbiter is being asked to exercise a jurisdiction which he does not possess, he may be interdicted, but the Court is averse to interfering with a going arbitration, and will never intervene so as to prevent the arbiter dealing with a claim the validity of which it does not see its way clearly to determine in the application for interdict.[1]

1173. The rules of friendly societies in giving effect to the provisions of the Friendly Societies Acts frequently prescribe arbitration as the mode of settling disputes between the society and the members.[2] The precise scope and method of arbitration depend on the wording of the rules. These rules are only binding on members and, where so provided, on persons claiming through members. Accordingly, if the title of a claimant to represent the deceased member is denied by the society the arbitration provisions do not apply.[3] But where a depositor had uplifted his whole balance before raising a case against a savings bank relative to a sum alleged to have been wrongly paid away by the bank, the fact that the dispute arose out of the contract of deposit clothed him with the character of depositor and brought in the arbitration provisions of the analogous legislation as to savings banks.[4] A question between the member and the society whether the society has acted *ultra vires* may be competently raised in the Courts.[5]

1174. In certain cases of statutory arbitrations provisions appear for the ascertainment of the law applicable to the facts by way of a case stated by the arbiter for the opinion of the Court. Where this procedure is available, the stated case is not a competent method of having the arbiter's decision on fact reviewed, but the Court may entertain and decide the question of law familiar in Workmen's Compensation cases, "Whether there is evidence on which it can competently be found that, etc."[6]

1175. A stated case is not only competent on proposed findings in fact,[7] but where the stated case is contemplated as taking place "at any stage during the proceedings" of the arbitration, it must be before final judgment by the arbiter;[8] but the fact that the arbiter has made findings and allowed a proof does not prevent the Court entertaining a stated case, inasmuch as the proceedings are still in progress, no final judgment having been pronounced.[9] If the provision is for *appeal from the arbiter on* questions of law by way of stated case, then such appeal will be competent after final judgment by the arbiter.[10]

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[1] *Glasgow, Yoker & Clydebank Rly.* v. *Lidgerwood*, 1895, 23 R. 195; *Dumbarton Water Commrs.* v. *Lord Blantyre*, 1884, 12 R. 115, per L. Pres. Inglis at p. 120.

[2] Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 9 (3), 68 (1), Sched. I., 8.

[3] *Symington's Exr.* v. *Galashiels Co-operative Store Co.*, 1894, 21 R. 371.

[4] *Melrose* v. *Trs. for Edinburgh Savings Bank*, 1897, 24 R. 483.

[5] *Andrews & Ors.* v. *Mitchell*, [1905] A.C. 78; *M'Gowan* v. *City of Glasgow Friendly Society*, 1913 S.C. 991.

[6] *Euman* v. *Dalziel*, 1912 S.C. 966. [7] *Mackenzie* v. *Macgillivray*, 1921 S.C. 722.

[8] *Johnston's Trs.* v. *Glasgow Corporation*, 1912 S.C. 300; *Smith* v. *Scottish Legal Life Assurance Society*, 1912 S.C. 611.

[9] *Lanark C.C.* v. *Mags. of Motherwell*, 1912 S.C. 1251.

[10] *Johnston's Trs.* v. *Glasgow Corporation*, 1912 S.C. 300, per L. Pres. Dunedin at p. 303.

1176. Where the Court on such a stated case has said what the law is, the arbiter is bound to give effect to the Court's judgment.[1]

Section 23.—Arbitration and Private International Law.

Subsection (1).—*Foreign Submissions.*

1177. A submission being a personal contract, it will, if entered into abroad, be enforced by the Scots Courts if it is effectual by the law by which the parties intended its validity to be determined, whether it be effectual according to the law of Scotland or not.[2] The Scots Courts will not, however, enforce such a contract, if, from reasons founded on general considerations of contract law, it is contrary to the public policy of Scots law.[3] The Courts will determine as a matter of construction in the light of the surrounding circumstances what the intention of the parties as to the law governing the validity of the contract was. In the leading case a contract entered into in London, to be implemented in Scotland, contained a provision for arbitration by members of the London Corn Exchange. The clause would—at that date—have been ineffectual by Scots law, but it was held by the House of Lords that the provision for arbitration in London was evidence of an intention that English law should be applied to determining its validity. As it was a good reference by English law, effect was given to the arbitration clause.[4] And the same principle was applied in the case of a contract between a Scots firm and a Belgian firm, to be implemented in Scotland, where the arbitration clause provided for arbitration "in London in the usual way."[5]

1178. Foreign law is, of course, a question of fact as far as the Scots Courts are concerned. In some cases an inquiry into that question of fact may be necessary if the validity of the arbitration contract by foreign law is challenged. But where it appears that the assistance of the foreign court will require to be invoked to render the arbitration contract effective, as *e.g.* where an application to them is necessary to have arbiters appointed, the Courts in Scotland are not bound to conduct an independent inquiry into the foreign law, but may sist procedure to await the result of the application to the appropriate tribunal who will determine questions falling to be settled by their own law.[6] The question of the procedure to be adopted is one of convenience, and the Courts in Scotland will, as a matter of practice, adopt the alternative which best suits the circumstances.[7]

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[1] *Mitchell-Gill* v. *Buchan*, 1921 S.C. 390.
[2] Ersk. Inst. iii. 2, 40 ; *Hamlyn* v. *Talisker Distillery Co.*, 1894, 21 R. (H.L.) 21.
[3] *Hamlyn, supra*, per L. C. Herschell at p. 23.
[4] *Hamlyn, supra.*
[5] *Robertson* v. *Brandes, Schönwald & Co.*, 1906, 8 F. 815.
[6] *Ibid.*
[7] *Municipal Council of Johannesburg* v. *Stewart & Co.*, 1909 S.C. 860, per L. Pres. Dunedin at p. 876 (rev. on another point, 1909 S.C. (H.L.) 53).

Subsection (2).—*Foreign Awards.*

1179. An award pronounced abroad, if valid according to the *lex loci contractus*, will be enforced in Scotland.[1] And an award in a Scots submission pronounced abroad, if well authenticated by the law of the country where it was drawn up, and if its genuineness be not disputed, will be enforced in Scotland although it may lack the solemnities of execution according to Scots law.[2]

1180. In enforcing a foreign award or submission the Scots Courts are giving effect to a contract the legal implications of which are determined by foreign law. It would appear, therefore, that the grounds of challenge available should be co-extensive with those available in the Courts of the *lex loci contractus*.[3] Otherwise the parties would be compelled to submit to having their contract reformed by reason of Scotland being the forum of enforcement. So where a Dutch award was challenged in Scotland, it was held, after an inquiry into the law of Holland, that as a challenge of the award on its merits was excluded by that law equally with Scots law, such a review would not be allowed in the process of enforcing the award in Scotland.[4]

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[1] *Ochterlony* v. *Grant*, 1754, M. 4470 ; *Johnstone* v. *Crawford*, 1776, M. Appx. Arb. 4.
[2] *E. of Hopetoun* v. *Scots Mines Co.*, 1856, 18 D. 739.
[3] Bell on Arbitration, 2nd ed., p. 396, para. 843.
[4] *Johnstone* v. *Crawford*, 1776, M. Appx. Arb. 4.

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ARMED FORCES OF THE CROWN.

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PART I.—INTRODUCTION.

1181. The Armed Forces of the Crown are made up of three groups: the Naval Forces, the Military Forces, and the Air Force. Each group has its own administrative and controlling body, and its own Minister who is a Secretary of State. Each group, moreover, has its own rules of discipline, system of courts, and scale of punishments. Within each group the armed forces comprise regular forces, reserve forces, and auxiliary or volunteer forces.

1182. Besides these forces raised in Great Britain and Northern Ireland by the Imperial Government, there are other armed forces in the Empire which are normally under the control of the various self-governing dominions and of India, but which may be placed under the control and administration of the Imperial Government, in which event they become part of the appropriate group of the armed forces.

1183. In addition to the three main groups it is necessary to consider the Royal Marines. This force is maintained under the powers contained in the Army and Air Force (Annual) Act, as are the Military and Air Forces, but is administered by the Admiralty, and is subject to naval or military discipline according to the nature of the service upon which it is engaged.

PART II.—THE NAVAL FORCES.

Section 1.—Administration.

Subsection (1).—*Origin.*

1184. The Navy as a permanent institution provided for out of the national revenues, and with its officers and men regularly engaged in the service of the Crown, may be dated from the reigns of Henry VII. and Henry VIII.; but it did not become the chief maritime force of the country until about the middle of the seventeenth century. Up to the latter period it had been maintained and employed rather as an auxiliary to the forces raised, at the outbreak of war, by the seaports and maritime towns which, under various conditions, were under obligation to furnish quotas of ships for the King's use, upon notice being given to them to assemble. When so assembled they were placed under the command of officers appointed by the King; and the soldiers raised by the feudal levies were the principal fighting force. The periods of the thirteenth and fourteenth centuries are important in connection with the growth of the Navy, and its organisation under royal officers, by the creation of the officers known as admirals exercising the Crown's jurisdiction by sea, and in 1360 by the appointment of a single High Admiral. Whether for the royal ships alone, after a navy had been established, or for the earlier naval forces raised by requisition, levied by the Crown or furnished by private enterprise, naval ordinances were issued as each expedition was sent out. The Lord High Admiral, or the officer placed

in command, issued specific instructions placing the persons serving under military law; and in the course of time a collection of precedents of offences and punishments grew up, which under the Commonwealth and during the reign of Charles II.[1] were embodied in Articles of War, which served for the government and discipline of the Navy both in war and peace, and were the foundation of the Naval Discipline Acts under which the Navy is at present governed. To these Articles were also due the first establishment of naval courts-martial found in the history of the Navy, in place of the summary powers which used to be exercised by commanders and captains during earlier periods.

Subsection (2).—*The Board of Admiralty.*

1185. The naval forces of the Crown are administered by the Board of Admiralty, and comprise the Royal Navy, the Royal Naval Reserve, the Royal Fleet Reserve, the Royal Naval Volunteer Reserve, the Colonial Naval Forces, and for certain purposes the Coastguards, and the Royal Marines and the Royal Marine Volunteers.

The Board of Admiralty is composed of the commissioners appointed under the Great Seal to execute the office of High Admiral.[2] These are the First Lord of the Admiralty, who is nearly always a member of the Cabinet, the First Sea Lord, the Second Sea Lord, the Third Sea Lord and Controller, the Fourth Sea Lord, the Civil Lord, the Additional Civil Lord, the Parliamentary and Financial Secretary, and the Permanent Secretary. Any two can exercise the powers and carry out the duties of the office.[3] This body exercises wide powers in connection with the sea, and its jurisdiction covers cases of piracy.[4] The Board has also certain powers to acquire land for service of the Admiralty, and may enforce compulsory acquisition. These provisions are set out in the Admiralty Lands and Works Act, 1864.[5]

1186. The Board of Admiralty also exercises powers in connection with harbours, docks, and piers, but by the Ministry of Transport Act, 1919,[6] these powers, or certain parts of them, may be transferred to the Ministry of Transport by and as from such date as may be mentioned in an Order-in-Council. No such Order has been made to date.

Subsection (3).—*Ships.*

1187. The vessels under the control of the Admiralty may be divided into two classes.

(*a*) Ships in commission, which are subject to naval discipline, and

(*b*) Ships not forming part of the Navy but belonging to or held by any person on behoof of the Crown. Such vessels, though under Admiralty orders, are not subject to ordinary naval discipline. These vessels could not formerly be registered under the Merchant Shipping

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[1] 13 Car. II. c. 9. [2] 7 & 8 Geo. IV. c. 65. [3] 2 & 3 Will. IV. c. 40, s. 6.
[4] 13 & 14 Vict. c. 26, s. 2. [5] 27 & 28 Vict. c. 57. [6] 9 & 10 Geo. V. c. 50, s. 2 (1).

Acts, but by Order-in-Council, dated 22nd March 1911,[1] this defect was remedied, and they may now be registered, subject to certain limitations, under these Acts. Under the provisions of the Washington Treaties and the Act [2] relative thereto the number of war vessels is limited, and no firm may build or contract for any war vessel without having previously obtained a licence from the Government.[3]

Section 2.—Regular Navy.

Subsection (1).—*Service in the Navy.*

1188. Officers receive their commissions from the Board of Admiralty, and the prohibition as to sale and purchase in 5 & 6 Edw. VI. c. 16, and 49 Geo. III. c. 126, applies to them ; but the limited exemption allowed to purchase and sale of commissions in the Army has never applied to them.

1189. The manning of the fleet by impressment of men and seizure of vessels is still lawful in war time, but there are several statutory exceptions. All persons under eighteen and over fifty-five are excluded, as also are foreigners serving in British merchant vessels. Impressment is carried out under a warrant from the Admiralty granted under an Order-in-Council. Powers of impressment also extend to vessels.[4] These powers were exercised during the late war.[5]

1190. By the Naval Enlistment Act, 1835,[6] no person is liable to be detained in the naval service against his consent for longer than five years, unless he voluntarily enters for a longer term. If he becomes entitled to discharge when his ship is abroad, and he signifies his desire not to continue longer in the service, he must be discharged forthwith, or, if he desire it, be sent in some ship of His Majesty to some port of the United Kingdom and there discharged. There is power, however, to detain him for six months in any special emergency or hazard to the public service. Section 9 also provides for discharge on a seaman providing one able seaman, or two able-bodied landsmen in his stead. This Act was extended by the Naval Enlistment Act, 1853,[7] to men who, under Admiralty regulations, entered for a term of ten years, or other term of continuous and general service. Able and ordinary seamen, however, are seldom taken directly into the Navy, provision having been made by the last-mentioned Act for the training of boys, who form, in ordinary times, the chief recruiting supplies. By s. 2 of that Act it is provided that every boy entering when under eighteen should be entered, and liable to serve, until the age of twenty-eight years ; and every person who, when of the age of eighteen years or upwards, should be entered as a boy, should be entered for ten years' continuous and general service.

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[1] S.R. & O., March 1911, p. 238.
[2] 12 & 13 Geo. V. c. 21 ; Schedule I. ss. 1, 2, and 4.
[3] S.R. & O. 1923 (No. 1271).
[4] *R.* v. *Broadfoot*, 1743, 18 St. Tr. 1323.
[5] Manual of Emergency Legislation, p. 178.
[6] 5 & 6 Will. IV. c. 24.
[7] 16 & 17 Vict. c. 69, s. 1.

To encourage seamen and others to enter the Navy, s. 4 provides that after proclamation calling for their services being published at any port, during peace or war, seamen who volunteer for the Navy are entitled to bounties in such manner, and according to such classes, as may be fixed by the proclamation; and by similar proclamation their term of service can be extended to an additional period of five years.

1191. By the Service of Seafaring Men Act, 1853,[1] in case of emergency, officers and men of the coastguard, revenue cruisers, and naval pensioners may be required to serve in the Navy for a limited period, but not longer than for five years, without their consent; and while serving they are entitled to the same pay and allowances as if they had been entered for ten years in the ordinary way, and pensioners continue to receive their pensions. In case of actual invasion, or imminent danger thereof, officers and men in the customs, and all other public departments, who are of a seafaring character become liable to serve for one year on the like terms.

By s. 8 of the Naval Enlistment Act, 1835, colonial seamen who volunteer to serve in the Navy for the regular term are entitled, after their discharge, if they desire to return to their native colony, to be conveyed thither free of expense, or are allowed a gratuity in money sufficient to cover the cost of their return, according to the discretion of the Admiralty.

1192. The Naval Enlistment Act, 1884,[2] modified the above Enlistment Acts by providing that the term of ten years should no longer be fixed by Statute, but that the Admiralty might make regulations enabling men to be entered or re-entered for periods to be fixed by those regulations. In respect of boys, it also provided that the entry might be for continuous and general service for such period, not exceeding twelve years, or, if they enter below the age of eighteen, not exceeding the time required for them to attain the age of thirty years, as might be fixed by such regulations.

The Poor Law Amendment Act, 1876,[3] enables guardians to pay out of their funds such sums as may be required by the regulations of the Navy on the entry of boys, for providing outfit or otherwise to enable any boy not already an apprentice in the merchant service, who is or whose parents are receiving relief, to enter into the Navy, and to incur all other expenses necessary for carrying out that object.

By s. 4 of the Act of 1884, the liability of petty officers and seamen in receipt of pensions to service in the Navy in cases of emergency was extended to persons enlisted or re-engaged after the passing of the Act, who have served as non-commissioned officers and men of the Royal Marines and are in receipt of pensions; unless they have enlisted in the Army Reserve Force.

1193. The Merchant Shipping Act, 1894,[4] provides that a seaman may

[1] 16 & 17 Vict. c. 73.
[2] 47 & 48 Vict. c. 46.
[3] 39 & 40 Vict. c. 61, s. 28.
[4] 57 & 58 Vict. c. 60, ss. 195, 7.

leave his ship and join the Navy without being guilty of desertion, or liable to any punishment or forfeiture; any stipulation in any agreement to the contrary is void, and a master or owner is liable to a fine not exceeding £20 for causing any such stipulation to be introduced. There are also provisions for obtaining the seaman's effects from the master, and payment of any wages due, with penalties on the master for their contravention.

It is an offence to enter the Navy from the Regular Army or from the Reserves, Militia, or Territorial Army.

1194. False answers made upon entering the naval service, with intent to deceive any officer or person authorised to enter or enlist seamen or others, are punishable under the Vagrancy Act, 1824,[1] by s. 16 of the Naval Enlistment Act, 1853. The granting of false characters is punishable.[2]

The oath of allegiance is not administered to entrants in the Navy as it is in the case of enlistment in the Army and other land forces.

1195. The Admiralty has the right to discharge any seaman or other person at any time from the naval service, if his services are not required; and discharge may also follow as a punishment on conviction by court-martial. Until actual discharge in due form, persons in the naval service remain subject to the discipline of the Navy, and to the laws relating thereto. Men may also be "dismissed from His Majesty's service" or "dismissed with disgrace from His Majesty's service," both of which are punishments which may be awarded by a court-martial.[3]

If after service for the regular period for which they enlisted they are discharged at a time when a proclamation is in force requiring the services of seafaring men, they are entitled to receive from the captain or commanding officer of the ships from which they are discharged certificates of their services, and the Admiralty thereupon issue a protection from service in the Navy for two years; but if discharge takes place (except upon the seaman's own application) before the end of the regular term of service, the protection only lasts for one year. Forging or counterfeiting any such certificate, or in any fraudulent manner causing a certificate to be issued, is a misdemeanour.[4]

1196. The provisions of s. 91 of the Army Act[5] relating to the sending of lunatic soldiers, by a Secretary of State, to workhouses and lunatic asylums, and other places in which lunatics can be confined, are applied by s. 3 of the Naval Enlistment Act, 1884, to persons in the naval service. The Admiralty is to be read for Secretary of State, and the declarations made by his parent or guardian, on a person entering into the naval service as a boy, or made by a man on entering such service, are respectively substituted for the attestation paper.

1197. Every person subject to naval discipline is liable to contribute to the maintenance of his wife and children, but no execution in respect of such liability can be issued against him, or his clothing or pay, except

[1] 5 Geo. IV. c. 83, s. 3. [2] 6 Edw. VII. c. 5. [3] 29 & 30 Vict. c. 109, ss. 52 and 56.
[4] Naval Enlistment Act, 1835, ss. 1, 2, 3. [5] 44 & 45 Vict. c. 58 as amended.

as provided below; and no such person is liable to punishment for the offence of deserting or neglecting to maintain his wife and children.[1] Where any such person has deserted or left in destitute circumstances without reasonable cause his wife or any legitimate child under fourteen years of age, or where, under any order or decree made under the Naval Discipline Act[2] or at common law, such a person is found liable to maintain or to refund sums of money spent upon maintaining his wife or children, including in this case any illegitimate child of which he is the putative father, the Admiralty may authorise a deduction to be made from his pay. The expression "pay" does not include allowances in lieu of lodgings, rations, provisions, and clothing. Such deductions are limited in amount according to the rank of the person and are entirely within the discretion of the Admiralty, and will not be made in cases where the person in question has not had a reasonable opportunity of defending himself.[3] Service of a process to enforce such liability is made on the officer commanding the ship on whose books the person is borne, or, if this is impracticable, may be made after not less than three weeks' notice to the Admiralty, by sending it to the Secretary of the Admiralty, together with such sum of money as may be ordered to enable the person in question to attend the hearing of the case and return to his ship.[4] These provisions do not apply to commissioned officers.

SUBSECTION (2).—*Discipline in the Navy.*

1198. The discipline of the Navy is provided for by the Navy Discipline Act, 1866,[5] and the Naval Discipline Act, 1884.[6] These Acts have been amended by the Naval Discipline Acts of 1909,[7] 1915,[8] 1917,[9] and 1922.[10]

The Naval Discipline Act of 1884 is reprinted at intervals, with all amendments and alterations made by the various statutes affecting it, by virtue of s. 8 of the 1922 Act which is made Part VIII. of the Naval Discipline Act of 1884. These Acts specify all the offences punishable by naval law, and the punishment annexed thereto, except that all crimes not capital, or punishable with penal servitude under the Acts, may, unless the Acts provide otherwise, be punished according to the laws and customs in such cases used at sea (s. 44 of the Act of 1866).

The Articles of War specifying the offences are contained in Part I. of the Act of 1866, and they comprise, firstly, offences purely against discipline which would not be punishable under the ordinary law; and, secondly, offences which are crimes under the ordinary law, but are made punishable also by the naval courts-martial, or summarily, under the Act.

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[1] Naval Discipline (No. 2) Act, 1915; 5 & 6 Geo. V. c. 73, s. 4.
[2] 47 & 48 Vict. c. 39 as amended.
[3] Naval Discipline Act, s. 98 A, as amended by 12 & 13 Geo. V. c. 37, s. 7.
[4] Naval Discipline (No. 2) Act, 1915; 5 & 6 Geo. V. c. 73, s. 4.
[5] 29 & 30 Vict. c. 109. [6] 47 & 48 Vict. c. 39. [7] 9 Edw. VII. c. 41.
[8] 5 & 6 Geo. V. c. 30, and Naval Discipline (No. 2) Act, 1915, c. 73.
[9] 7 & 8 Geo. V. c. 34. [10] 12 & 13 Geo. V. c. 37.

1199. Many of the offences under the first class are punishable with death, but in every case now one of the alternative punishments prescribed in s. 52 can be substituted. This is the case also with those serious offences for which penal servitude is prescribed ; that principle in fact being applied to every specified punishment.

Under the second class, murder is punishable with death ; manslaughter, with penal servitude, or such other punishment as thereinafter mentioned ; sodomy, with penal servitude ; indecent assault, with penal servitude, or such other punishment as thereinafter mentioned ; robbery or theft, with penal servitude, or such other punishment as thereinafter mentioned.

The above, it will be noticed, do not follow the scale of punishments prescribed under the ordinary law. But s. 45 provides that other offences may be punished either as prejudicial to good order and discipline (s. 43), or with the same punishment as an ordinary criminal tribunal would award.

1200. The following is the scale of punishments arranged according to degree ; and where one punishment is specified but another punishment may be awarded, any one or more of the punishments inferior in degree may be awarded (s. 55) :—

1. Death.

2. Penal servitude—life or not less than five years.

3. Dismissal from the service with disgrace ; involving in all cases forfeiture of all pay, annuities, pensions, medals, and all other rights of a like kind, and an incapacity to serve in any military, naval, or civil service ; and it may be accompanied with imprisonment.

4. Imprisonment, not exceeding two years, with or without dismissal ; [1] or corporal punishment, not more than forty-eight lashes ; but no officer is subject to corporal punishment, and no petty or non-commissioned officer, except in case of mutiny.

5. Dismissal from the service.

6 to 10. Other minor punishments, such as forfeiture of seniority and pay, etc., reprimand, and disrating.

11. Such minor punishments as are now inflicted according to the custom of the Navy, or may from time to time be allowed by the Admiralty.

By the Naval Discipline Act, 1909,[2] detention is substituted for imprisonment, in order to avoid the stigma attaching to the latter. The maximum term is two years. The detention is either in naval detention quarters, or in a detention barrack ; or it may be partly in one and partly in the other. It must not be in a prison.

Upon a charge of any offence the prisoner may, upon failure of proof of the commission of the greater offence, be found guilty of another offence of the same class involving a less degree of punishment, but not of any offence involving a greater degree of punishment (ss. 47, 48).

[1] 5 & 6 Geo. V. c. 30, s. 6. [2] 9 Edw. VII. c. 41.

1201. Unless an offender has avoided apprehension, or fled from justice, the trial must take place within three years from the commission of the offence, or within one year after the return of the offender to the United Kingdom (s. 54).

All the offences specified may be tried and punished under the Act (s. 46) if they are committed—

(*a*) Whether in or out of the United Kingdom, in any harbour, haven, or creek, or on any lake or river.

(*b*) Anywhere within the jurisdiction of the Admiralty.

(*c*) At any place, on shore, out of the United Kingdom.

(*d*) In any of His Majesty's dockyards, victualling yards, steam factory yards, or on any gun wharf, or in any arsenal, barrack, or hospital belonging to His Majesty, or in any other premises held by or on behalf of the Crown for naval or military purposes, or in any canteen or soldiers' home or place of recreation used by the officers and men of the Navy [1]—whether in or out of the United Kingdom.

(*e*) The offences of "misconduct in the presence of the enemy," "communications with the enemy," "neglect of duty," "mutiny," "insubordination," "desertion and absence without leave," or "miscellaneous offences"—whether in or out of the United Kingdom.

1202. Any officer in command of a fleet or squadron or of a ship, or the senior officer present at a port, may by warrant under his hand authorise any person to arrest any offender subject to the Act for any offence against the Act mentioned in the warrant. Such person may be taken on board the ship to which he belongs, or some other of His Majesty's ships; and force may be used for effecting the apprehension (s. 50).

In *R.* v. *Cuming and Another* [2] it was held that a naval officer being subject to the Act might arrest an offender without this warrant.

As to the apprehension of deserters by any constable, or any person in His Majesty's service, their examination by a justice of the peace in any part of His Majesty's dominions, and their committal to prison pending their deliverance into the custody of the naval authorities, see the Naval Deserters Act, 1847.[3]

1203. The persons subject to the Act, and who are made liable thereto, and triable and punishable thereunder, are the following:—

1. Every person in, or belonging to, the Navy, and borne on the books of any of His Majesty's ships in commission—that is, equipped and in service—at the time of the offence.

2. His Majesty's land forces, when embarked upon any of His Majesty's ships, under such regulations as may be made by Order-in-Council. The Order at present in force is dated 6th February 1882.

3. All other persons ordered to be received or being passengers on board any of His Majesty's ships, under such regulations as the Admiralty may from time to time direct.

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[1] 5 & 6 Geo. V. c. 30, s. 3. [2] 1887, 19 Q.B.D. 13. [3] 10 & 11 Vict. c. 62.

4. Persons on the books of hired vessels in His Majesty's service in time of war, being either armed or under the command of a naval officer, if the Admiralty think fit so to direct.

5. The crews of any of His Majesty's ships wrecked, lost, or destroyed, or taken by the enemy.

6. All spies for the enemy.

7. All persons, not otherwise subject to the Act, *e.g.* civilians, who, being on board any ship of His Majesty, shall endeavour to seduce from his duty or allegiance any person subject to the Act.

8. The classes of persons who, as before mentioned, may be required to serve in the Navy, when so required to serve.

9. Officers of Reserve to the Royal Navy, under the Officers of Royal Naval Reserve Act, 1863,[1] when called out for training or exercise, or on actual service.

10. Officers and men of the Navy who are serving in a ship belonging to the naval forces of one of the self-governing Dominions are subject to the laws and customs for the time being applicable to the ships and naval forces of that Dominion.[2]

Subsection (3).—*Naval Courts.*

1204. These Courts are either courts-martial, or the Courts of officers in command of ships, whose jurisdiction is derived exclusively from the Naval Discipline Acts over the persons and the offences committed within the times and places above described.

Any offence not capital triable under the Acts, and which is not committed by an officer, may, under such regulations as the Admiralty may make, be summarily tried and punished by the officer in command of the ship to which the offender belongs at the time, either of the commission of the crime, or of the trial of the offence, subject to the restriction that the commanding officer shall not have power to award penal servitude, or to award imprisonment for more than three months.[3] This does not include power to inflict corporal punishment, except for mutiny, unless the offence has been inquired into by one or more officers appointed by the commanding officer, and his or their opinion as to the guilt or innocence of the prisoner reported to him, whereupon the commanding officer is to act as according to his judgment may seem right.[4] In the case of a person quartered in naval barracks, the commanding officer is the officer in command of those barracks.[5]

Other persons besides commanding officers who may exercise those summary powers are described in subs. (3) of s. 1 of the Act of 1884.[3]

1205. In time of war an officer, borne on the books of a ship in commission, who is alleged to have been guilty of a breach of discipline may

[1] 26 & 27 Vict. c. 70.
[2] Naval Discipline Act, s. 90 B; 12 & 13 Geo. V. c. 37, s. 6.
[3] 47 & 48 Vict. c. 39, s. 1.
[4] 29 & 30 Vict. c. 109, s. 56.
[5] 5 & 6 Geo. V. c. 30, s. 7.

be tried by a Disciplinary Court provided that, in the opinion of the officer who would have power to order a court-martial, the offence is not sufficiently serious to necessitate a trial by court-martial. A Disciplinary Court consists of not more than five officers of whom one must be a commander or officer of higher rank. This Court cannot impose any punishment greater than detention.[1]

1206. Any offence triable under the Acts may be tried and punished by court-martial whether committed by officers or men.

There is no legal right to demand a court-martial; and it is in the discretion of the authority empowered to order such a Court to be held to decide whether, upon formal application containing the charge or complaint and other matters as prescribed in the regulations, a trial shall be granted.

In the United Kingdom the Admiralty is the authority exercising this power. It may also grant commissions to any officer of the Navy on full pay, authorising him to order these Courts to be held; and these commissions are granted to commanders-in-chief on foreign stations, and commanders of detached squadrons. Under circumstances detailed in subsecs. (11) and (12) of s. 58 of the Act of 1866, senior officers of division may be empowered by the commander-in-chief to assemble courts-martial. Subsection (10) also provides that where at any place there is an officer superior in rank to the officer empowered to order a court-martial, the officer of superior rank may, without a commission for that purpose, order a court-martial. The officer ordering cannot sit as a member of the Court. The president is named by the authority ordering the Court, or this is intrusted in the home ports to the commander-in-chief at the port, or abroad to the senior officer present, when the commander-in-chief is not at the place. The order for the Court is addressed to the president, to whom are sent the charge and other documents. In the absence of the Judge Advocate of the Fleet or deputy, or a special appointment by the Admiralty, the president appoints a judge advocate for the trial. The president (if the officer ordering the court-martial is not present at the place where it is held) appoints a provost-marshal to arrest and keep the prisoner in custody.

1207. A court-martial cannot be held unless at least two ships, not being tenders, and commanded by captains, commanders, or lieutenants on full pay, are together when the court-martial is held. General orders are given or signalled, and all officers junior to the president, of a rank eligible to sit on a court-martial, must be present, unless they are absent with leave.

The Court must consist of not less than five nor more than nine officers. No officer is qualified to sit unless he be a flag officer, captain, commander, or lieutenant on full pay, and not under twenty-one years of age. If the prisoner is a flag officer, the president must also be a flag officer, and the other officers either of the rank of captain or of higher

[1] Naval Discipline Act, 1884, s. 57 A, amended by 5 & 6 Geo. V. c. 73, s. 2.

rank ; and if a captain, the president must be a captain or of higher rank, and the other officers commanders or officers of higher rank. If the prisoner is below the rank of captain, the president must be a captain or of higher rank ; and if the prisoner is of the rank of a commander, in addition to the president two other members of the Court must be of the rank of commander or of higher rank (s. 2 of the Act of 1884). The prosecutor cannot sit on any court-martial for the trial of the prisoner whom he prosecutes (s. 58, subs. (8)).

The Court must be held on board a ship or vessel of war, unless the Admiralty, or any officer authorised to order a court-martial, for a particular reason, which is to be recorded on the proceedings, directs otherwise ; in which case the court-martial is to be held on shore at such port as may be directed.[1]

A right of objection to members of the Court is allowed (s. 62).

The procedure is laid down in the Admiralty Regulations.

1208. All persons summoned and attending as witnesses are privileged from arrest while attending, going to, and returning from, the Court. Civilian witnesses not attending, refusing to be sworn, or to affirm, or give evidence, or answer legal questions, or prevaricating, shall, upon certificate under the hand of the president, be liable to be attached in the High Court, as if they had been summoned and subpœnaed in that Court. In the case of a naval witness, the court-martial may punish non-attendance, or refusal to give evidence, or prevarication, with not longer than three months' imprisonment, and not longer than one month for behaving with contempt of the Court (s. 66).

Perjury before a court-martial is punishable as in other cases (s. 67).

1209. In the case of a sentence of death, four at least of the officers present where the number does not exceed five, and in other cases a majority of not less than two-thirds, must concur (s. 53, subs. (2)).

If the sentence is one of penal servitude, it has the same effect as a like sentence by a Civil Court ; and the prisoner is to be taken to some prison in which a convict sentenced by a Civil Court can be confined (s. 3 of Act of 1884).

Sentences may be passed to take effect on the conclusions of a previous sentence, but this is not to cause a person to undergo imprisonment exceeding two consecutive years (s. 4).

The place of imprisonment may be in one of the naval prisons under the Acts, or any common gaol, house of correction, or military prison within His Majesty's dominions (s. 74 of the Act of 1866, and s. 5 of 1884).

When a person has been sentenced to penal servitude, imprisonment, or detention, the Admiralty or officer authorised under the Act or by the Admiralty [2] may order that the sentence be suspended until an order of committal is issued. Such a case is to be reconsidered every three

[1] 5 & 6 Geo. V. c. 30, s. 8. [2] 7 & 8 Geo. V. c. 34, s. 1.

months, and the sentence may at any time be remitted in whole or in part. Even after an order of committal has been made the sentence may be suspended, and in that case the person is to be discharged but may be later recommitted, and suspension does not necessarily imply that penalties other than penal servitude, imprisonment, or detention are to be remitted or suspended.[1]

1210. By s. 81 of the Act of 1866 the Admiralty may set apart any buildings or vessels, or any parts thereof, as naval prisons, which are to be deemed naval prisons within the meaning of the Act ; and s. 6 of the Act of 1884 provides that the Admiralty shall have the same power in respect to them as a Secretary of State has in relation to military prisons.

If a prisoner becomes insane, he may be removed under warrant of the Admiralty to a lunatic asylum for the unexpired term (s. 80).

Section 3.—The Royal Naval Reserve.

1211. The Royal Naval Reserve is authorised by the Royal Naval Reserve (Volunteer) Act, 1859.[2] There is no limit to the number which may be enrolled in this force. Persons engage to serve for five years, and training and instruction is to be for a period not exceeding twenty-eight days in any one year. A person enlisted in this force is under naval discipline, and on failure to appear for training or instruction may be treated as a naval deserter. Pay, while serving, is on a similar scale to that of the Navy. The Royal Naval Reserve is called out on active service by Admiralty directions following on communication to Parliament or upon a Proclamation of the existence of a state of danger. When it is called out the liability to serve extends to three years, which may by Royal Proclamation be extended for a further period of five years. Persons having the requisite qualifications may be accepted as officers and granted commissions.

Section 4.—The Royal Fleet Reserve.

1212. The Royal Fleet Reserve is authorised by the Naval Reserve Act of 1900,[3] and is known by its present name under authority of the Naval Forces Act of 1903.[4] The only persons who are eligible to be enrolled in this force are (1) persons who have served in the Royal Navy or the Royal Marines since 8th August 1908, and are in receipt of pensions conditional on so serving ; (2) artisans formerly employed by the Admiralty on conditions similar to the above ; and (3) persons formerly in the Royal Navy or the Royal Marines who voluntarily enlist in this force.

[1] Naval Discipline Act, s. 74 A, and 5 & 6 Geo. V. c. 30, s. 11.
[2] 22 & 23 Vict. c. 40, s. 1.
[3] 63 & 64 Vict. c. 52, s. 1 (1).
[4] 3 Edw. VII. c. 6, s. 4.

Section 5.—The Royal Naval Volunteer Reserve.

1213. The Royal Naval Volunteer Reserve is raised under authority of the Naval Forces Act, 1903,[1] and is governed by the Royal Naval Reserve (Volunteer) Act, 1859,[2] subject to certain modifications.

Section 6.—The Colonial Naval Defence Forces.

1214. Provision is made in the Colonial Defence Acts of 1865[3] and 1909[4] for the raising of such forces by the colonies. The term "colony" includes any plantation, island, or other possession within His Majesty's dominions exclusive of Great Britain and Northern Ireland and of India. It is lawful for any such colony, with the approval of His Majesty in Council, to make provision for effecting, at the expense of the colony, any or all of the following :—

1. Providing, maintaining, and using vessels of war.
2. Raising and maintaining seamen and others to serve in such vessels, and in cases of emergency in the Royal Navy.
3. Raising and maintaining a body of Volunteers, entered on the terms of being bound to general service in the Royal Navy in emergencies or in the colonial vessels.
4. Appointing commissioned, warrant, and other officers, or obtaining their services from the Admiralty.
5. Enforcing good order and discipline among officers and men while ashore or afloat within the limits of the colony, or making them subject to the enactments and regulations in force in the Royal Navy.[5]

1215. Volunteers so raised form part of the Royal Naval Volunteer Reserve,[6] but remain subject exclusively to the provisions made by the proper legislative authority of the colony, except in cases where the Government of the colony offer their services to and such offer is accepted by the Imperial Government, in which case they serve under the provisions governing the Royal Naval Volunteer Reserve. The Government of the colony may also offer the services of some or all of the vessels together with the officers and men serving thereon. If such offer is accepted the vessels and the officers and men are treated as forming part of the Royal Navy.

1216. The naval defence of the Irish Free State is meantime to be carried out by His Majesty's Imperial Forces, and they are to be afforded certain harbour facilities.[7]

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[1] 3 Edw. VII. c. 6, s. 1 (1).
[2] 22 & 23 Vict. c. 40.
[3] 28 & 29 Vict. c. 14.
[4] 9 Edw. VII. c. 19.
[5] 28 & 29 Vict. c. 14, s. 3.
[6] 9 Edw. VII. c. 19, Schedule, Part I., ss. 4 and 7.
[7] 12 & 13 Geo. V. c. 1, ss. 6 and 7 and annex.

PART III.—THE ROYAL MARINES.

Section 7.—The Royal Marines.

1217. The Royal Marines date, in their present form, from 1755, and the raising and maintaining of this force is authorised each year by the Army and Air Force (Annual) Act for a period of one year. The cost of the force is, however, included in the Naval Estimates, and the government and control of the force is entirely in the hands of the Admiralty.[1] The sole command is in the Crown.[2] Enlistment is for a period not exceeding twelve years, but may be extended by voluntary re-engagement. Officers and men are subject to naval discipline or military law according to whether they are borne upon the books of a commissioned vessel or are serving on land and are not borne upon the books of a vessel. While borne upon the books of a commissioned vessel they are subject to the Naval Discipline Act, and the rules made thereunder;[3] while not so borne, marines are subject to the military discipline of the Army. Under certain circumstances marines in the former category may become subject to military discipline.[4]

Section 8.—The Royal Marine Volunteers.

1218. The Royal Marine Volunteers are raised under the authority of the Naval Forces Act, 1903,[5] and are governed and controlled by the Admiralty. When called out for service they are subject to discipline in the same manner as the Royal Marines.

PART IV.—THE MILITARY FORCES.

Section 9.—General.

1219. The Military Forces of the Crown consist of the Regular Army, the Territorial Army, and the auxiliary or reserve forces, comprising the Reserve and the Militia. The administration of the military forces is in the hands of the Army Council,[6] but for civil and financial purposes the Territorial Army is administered by the Territorial Force Associations.[7] The Army Council consists of seven members, viz.: the Secretary of State, four military members (the Chief of the Imperial General Staff,[8] the Adjutant-General, the Quartermaster-General, and the Master-General of Ordnance), a Finance Member, and a Civil Member. The Secretary of State remains responsible to the Crown and Parliament for all the proceedings of the Council, but the Council is vested in most of the powers formerly exercised by

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[1] 44 & 45 Vict. c. 58.
[2] 13 Car. ii. st. i. c. 6.
[3] 44 & 45 Vict. c. 58.
[4] 44 & 45 Vict. c. 58, s. 179.
[5] 3 Edw. VII. c. 6.
[6] Letters patent of 6th February 1904.
[7] *Vide infra.*
[8] Order-in-Council, dated 27th February 1918.

the Secretary of State, and in all the powers formerly exercised by the Commander-in-Chief and the Adjutant-General.[1] The conduct and discipline of the Military Forces is regulated by military law.

Section 10.—Regular Forces.

Subsection (1).—*Definition.*

1220. The term "Regular Forces" covers the troops of the Regular Army, but does not include either the Indian Army or forces raised in and maintained by the self-governing Dominions. Upon mobilisation members of the Reserve are absorbed into and become part of the Regular Army.

Subsection (2).—*Commissions.*

1221. Officers hold their positions by virtue of commissions which were formerly bought and sold. Commissions are now obtained by open competition through the Royal Military Academy, the Royal Military College, or through the Officers' Training Corps; by competition from the Militia, as King's Cadets, or through the Colonies by a qualifying examination, or through the ranks. An officer, though appointed to a particular corps or regiment, is liable to serve with any portion of the army if so ordered. An officer is not entitled to resign his commission whenever he pleases, but his resignation must be accepted before it becomes effectual.[2] Officers cannot obtain redress in the Civil Courts for injuries which affect only their military status or character. Thus no remedy will be given by the Civil Courts to an officer for dismissal, deprivation of rank, or reduction or deprivation of military pay.

1222. A member of the House of Commons who accepts for the first time a commission in the Army or Navy must resign his seat, but may be re-elected.[3] The acceptance of a new commission by a member who is already in the Army or Navy does not vacate his seat.[4] This exception has been extended to the acceptance of a commission in the Marines.[5] A member who accepts a commission in the Reserve Offices or the Territorial Force does not vacate his seat.[6]

Subsection (3).—*Enlistment.*

1223. Enlistment is dealt with in Part II. of the Army Act.[7] Impressment for military service was finally abolished in 1640,[8] and enlisting for military service in the regular forces is now entirely voluntary. All British subjects are entitled to offer themselves for enlistment, and aliens may be accepted with the consent of the Crown provided that the

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[1] Order-in-Council, dated 10th August 1904.

[2] Manual of Military Law, 1914, p. 197, and cases there cited. *Hearson* v. *Churchill*, [1892], 2 Q.B. 144.

[3] 6 Anne c. 41, s. 25.

[4] 6 Anne c. 41, s. 27.

[5] 2 Hatsell, 62 (*n*).

[6] 7 Edw. VII. c. 91, ss. 23 (1) and 36.

[7] Army Act, 1881 (44 & 45 Vict. c. 58), as amended.

[8] 16 Chas. I. c. 28.

number serving at any one time in any corps of the Regular Forces does not exceed the proportion of one alien to every fifty British subjects. No alien is capable of holding any higher rank than that of warrant officer. "A person may enlist to serve His Majesty as a soldier of the regular forces for a period of twelve years, or for such less period as may be from time to time fixed by His Majesty, but not for any longer period, and the period for which a person enlists is in this Act referred to as the term of his original enlistment." [1] If he is enlisted as a boy the period counts from the day he attains the age of eighteen years. A person may enlist either for the whole term of his original enlistment in army service, or for a portion of his original enlistment, to be fixed from time to time by a Secretary of State and specified in the attestation paper, in army service and for the remainder in the reserve.[2] A Secretary of State may vary the conditions, with the assent of the soldier, either by allowing him to go into the reserve, or extending his service with the colours, or extending the term of his original service up to twelve years. A soldier's service is reckoned from the date of his attestation, but if he is guilty of desertion or fraudulent enlistment the whole of his prior service is forfeited. But this service may be restored by the Army Council.

1224. Every person offering to enlist receives from the recruiter, *i.e.* a person authorised to enlist, a notice stating the general requirements of attestation, and the general conditions of the contract to be entered into by the recruit, and directing him to appear before a justice of the peace. If he does not appear, or, on appearing, does not assent to be enlisted, no further proceedings are taken. If he appears and assents to be enlisted, the justice being satisfied that he is not under the influence of liquor, he is cautioned not to give false answers, and the questions in the attestation paper are put to him, and his answers recorded. He is then required to sign the attestation and take the oath of allegiance, and is thereupon deemed to be enlisted as a soldier in His Majesty's forces.[3] Any person who recruits without due authority or interferes with the recruiting service is liable on summary conviction to a fine not exceeding twenty pounds.[4] Any person who knowingly makes a false answer to any question contained in the attestation paper is liable on summary conviction to be imprisoned, with or without hard labour, for any period not exceeding three months; or, if attested as a soldier, he may be tried by court-martial.[5] The justice must sign and date the attestation paper, and deliver it to the recruiter, and the recruit is entitled to get a certified copy of the attestation paper from the officer who finally approves of him for service. The fee for each attestation is one shilling, and shall be paid to the justice's clerk, and the recruiter's gift of a shilling is no longer necessary.[6] A recruit can, within three months after the date of his enlistment, buy his discharge as a matter of right, on payment of a sum not exceeding £20, unless he claims such discharge during a period when the reserves are called out, in which case

[1] Army Act, s. 76. [2] *Ibid.*, s. 77. [3] *Ibid.*, s. 80.
[4] *Ibid.*, s. 98. [5] *Ibid.*, s. 99. [6] *Ibid.*, s. 80.

he can still buy his discharge on the same terms when that period has expired.[1]

1225. Subject to regulations made from time to time by a Secretary of State, a recruit may be enlisted for service in a particular corps: otherwise he is enlisted for general service. On attestation he is appointed either to the particular corps, or, if enlisted for general service, to some corps of the regular forces by the competent military authority, defined in s. 101 to be "the Army Council, or any officer prescribed in that behalf."[2] The Rules of Procedure set forth the other officers who have been so prescribed.[3] The recruit when appointed may be "posted," in the case of infantry, to a battalion of his territorial or other regiment; in the case of artillery, to any brigade or battery; in the case of engineers, to any troop or company; and in the case of other corps, to any company or station, according to their respective subdivisions: but he cannot be transferred, *i.e.* moved out of the corps to which he belongs, without his consent, except under the special conditions laid down in s. 83, for the purpose of retaining him in a place when the corps removes, or as a punishment.

1226. Subject to any regulations made by a Secretary of State, a soldier, after the expiry of nine years from the date of the original term of his enlistment, may, on the recommendation of his commanding officer, and with the approval of the competent military authority, re-engage for such further period as will make up a total continuous period of twenty-one years.[4] He may also re-engage after twenty-one years, with a right to his discharge three months after claiming it.[5] Non-commissioned officers may also re-engage.[6] Regulations made in pursuance of this section are contained in King's Regulations.[7] A soldier's service may be prolonged for a period not exceeding twelve months during war when the soldier is on service beyond the seas, or when the reserves are called out.[8] His Majesty in Council, in case of imminent national danger or of great emergency, may by proclamation —the occasion being first communicated to Parliament, if Parliament be then sitting, or if Parliament be not then sitting, declared by the proclamation—continue in permanent service soldiers entitled to be transferred to the reserve, or to call out the reserves.[9]

1227. A Secretary of State may make regulations as to persons entitled to enlist, and the enlistment of soldiers.[10] Any inhabitant of any British protectorate and any negro or person of colour, though an alien, may, without restriction as to numbers, voluntarily enlist, and while serving in His Majesty's regular forces is entitled to all the privileges of a natural-born British subject.[11] A master is entitled to claim an apprentice under twenty-one who has been attested as a soldier, provided the apprentice was bound for at least four years by a regular indenture,

[1] Army Act, s. 81.
[2] *Ibid.*, s. 82.
[3] Rules of Procedure, Rule 128.
[4] Army Act, s. 84.
[5] *Ibid.*, s. 85; King's Regulations, paras. 270–72.
[6] Army Act, s. 86.
[7] King's Regulations, paras. 264–72.
[8] Army Act, s. 87.
[9] *Ibid.*, s. 88.
[10] *Ibid.*, s. 93.
[11] *Ibid.*, s. 95.

and was under sixteen when so bound ; and provided, further, that the master, within one month after the apprentice has left his service, takes, before a justice of the peace, the oath prescribed in the first schedule of the Act, and gets an order from a Court of summary jurisdiction for the delivery of the apprentice. A master who gives up an apprentice's indenture within one month after his attestation is entitled to receive so much of the bounty (if any) payable on enlistment to the apprentice as has not been paid to him before notice was given that he was an apprentice.[1] These provisions also apply to the case of a person who is an indentured labourer in a colony at the time of his attestation ; and if he has been imported at the expense of the employer or the colony, he may be claimed though above twenty-one, and though indentured for less than four years, and at an older age than sixteen.[2]

1228. Any person who without due authority publishes notices or advertises with regard to recruiting, opens a house or place of rendezvous for recruiting, receives any person under such advertisement, or directly or indirectly interferes with the recruiting service, is liable on summary conviction to a fine not exceeding £20.[3]

1229. Any objection, on the ground of error or illegality with regard to the attestation on enlistment or re-engagement of a soldier must be taken within three months, if the soldier has been in receipt of pay during that period, in order to make good a claim to be discharged on the ground of such error or illegality ; and when a person is in pay as a soldier in any corps of His Majesty's regular forces, although he may not have been attested or re-engaged, or not duly attested or re-engaged, he is to be deemed for all the purposes of the Act to be a soldier of the regular forces, with the qualification that he may at any time claim his discharge.[4]

Subsection (4).—*Discharge and Transfer to Reserve.*

1230. A soldier who has been invalided from service beyond the seas, or who, when ordered on service beyond the seas, is either medically unfit for such service, or is within two years of the end of the period of his army service, may, by order of the competent military authority, be transferred to the reserve.[5] A soldier cannot be discharged except by order of His Majesty, by sentence of court-martial, or by order of the competent military authority, and is entitled, on discharge, to receive a certificate of discharge, and a certificate of character, showing his conduct, character, and cause of discharge.[6] A soldier enlisted in the United Kingdom, if serving beyond the sea, is entitled to be sent to the United Kingdom, free of expense, for his discharge or transfer to the reserve ; and a soldier enlisted in the United Kingdom, and discharged or transferred there, is entitled to be sent, free of expense, to the place where he was attested, or to his residence, if his conveyance there cost

[1] Army Act, s. 96. [2] *Ibid.*, s. 97. [3] *Ibid.*, s. 98.
[4] *Ibid.*, s. 100. [5] *Ibid.*, s. 89. [6] *Ibid.*, s. 92.

no more.[1] If a soldier is a lunatic, a Secretary of State may, on his discharge, send him, and his wife and child, to the parish to which he appears, from his attestation paper and other available information, to be chargeable, and the inspector of poor of such parish is bound to receive him ; if he is a dangerous lunatic, he may be sent direct to an asylum by order of a Secretary of State, and such order will, in like manner, make him chargeable in the parish to which he appears to belong.[2]

Section 11.—The Territorial Army.

Subsection (1).—*General.*

1231. The Territorial and Reserve Forces Act, 1907,[3] and the Territorial Army and Militia Act, 1921,[4] are the Acts regulating the Territorial Army, which has now taken the place of the Volunteers. The force is also governed by the Territorial Force Regulations. The administration of the force is carried out by County Associations. The expenses of the associations are provided by the Army Council out of money voted by Parliament.

Subsection (2).—*Enlistment and Discharge.*

1232. Men are enlisted to serve for such period as may be prescribed, not exceeding four years. A man may be re-engaged, and while proclamation ordering the army reserve to be called out on permanent service is in force, he may be required to prolong his service for such further period, not exceeding twelve months, as the competent military authority may prescribe.[5]

Any man is entitled to his discharge, except when the army reserve is called out, upon certain conditions, the most onerous of which is a payment of £5 to the County Association ; but the County Association may dispense with the conditions.[6] Any man may be discharged by his commanding officer for disobedience to orders, misconduct, or other sufficient cause ; but he may appeal to the Army Council.

Subsection (3).—*Training.*

1233. The annual training of the force is for not less than eight, and for not more than fifteen, or in the case of the mounted branch eighteen, days in every year. The period may be extended to not more than thirty days or reduced by Order-in-Council laid before Parliament in session.[7] Failure to fulfil training conditions is punishable with a fine not exceeding £5, which may be recovered in a Court of summary jurisdiction.[8]

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[1] Army Act, s. 90.
[2] *Ibid.*, s. 91.
[3] 7 Edw. VII. c. 9.
[4] 11 & 12 Geo. V. c. 37.
[5] T.R.F.A., ss. 9–10 (1); Army Act, s. 101 (1).
[6] T.R.F.A., s. 9.
[7] *Ibid.*, ss. 15–16.
[8] *Ibid.*, s. 21.

SUBSECTION (4).—*Embodiment.*

1234. When the army reserve is called out on permanent service, it is lawful for His Majesty to order the Army Council to embody the Territorial Force.[1] Any man who fails to attend on embodiment without leave, or sickness, or other reasonable cause, is guilty of desertion.[2]

SUBSECTION (5).—*Area of Service.*

1235. The Territorial Force is liable to serve in any part of Great Britain, Northern Ireland, or the Isle of Man. Men may volunteer to serve in any place outside the United Kingdom, and such volunteers form the Special Service Section.[3]

SUBSECTION (6).—*Civil Rights and Exemptions.*

1236. Acceptance of a commission in the Territorial Force does not vacate a seat in Parliament. An officer or man is entitled to vote at a parliamentary election without penalty for absence, and is exempt from serving on any jury.[4]

SUBSECTION (7).—*County Associations.*

(i) *Constitution.*

1237. The County Association is the body entrusted with the civil and financial administration of the Territorial Army within its district, except during the periods of annual training in camp, of embodiment, and of actual military service. Power to establish such an association for any county in the United Kingdom and for the Isle of Man is given by the Territorial and Reserve Forces Act, 1907.[5] In Scotland counties of cities are entitled to a separate association.[6] Associations are constituted and the members thereof are appointed and hold office, in accordance with schemes made by the Army Council and laid before Parliament.[7] The Army Council have issued a Model Scheme.[8]

Every such scheme must contain certain essential provisions, which are set forth in s. 1 (3). The lieutenant of the county, or, failing him, such other person as the Army Council may think fit, is the president of the association. The chairman and vice-chairman are appointed by the Army Council up to 2nd August 1910; after that date they are elected by the association.[9] The members of the association consist of (1) military members, (2) representative members, and (3) co-opted members.

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[1] T.R.F.A., s. 17. [2] *Ibid.*, s. 20. [3] *Ibid.*, s. 13. [4] *Ibid.*, s. 23.
[5] 7 Edw. VII. c. 9. [6] T.R.F.A., s. 40 (1). [7] *Ibid.*, ss. 1 and 37.
[8] Baker, The Territorial Force, p. 277. [9] T.R.F.A., s. 1 (3).

1238. Military members are appointed by the Army Council. Their number must not be less than half of the whole association, including president, chairman, and vice-chairman. A military member must be an officer who is representative of an arm or branch of the Territorial Force administered by the association.

Representative members are appointed by the Army Council from county and town councils and the universities, after consultation with the bodies to be represented.

Co-opted members are selected by the other members of the association, and may include representatives of employers and workmen.

1239. A member of the association, other than the president, vacates his office if he (1) is absent from meetings of the association for more than six months consecutively, except for some reason approved by the association ; or (2) is convicted, either summarily or on indictment, of any crime and sentenced to imprisonment with hard labour without the option of a fine, or to a greater punishment ; or (3) is adjudged bankrupt, or makes a composition or arrangement with his creditors.[1] If a military member ceases to be legally entitled to the style and rank of an officer in the Territorial Force, he vacates his office. A person is disqualified from being appointed or being a member of the association if he holds any paid office under the association, or is concerned in any bargain or contract entered into with the association, or participates in the profit of any such bargain or contract, or of any work done under the authority of the association. But a person is not disqualified by reason of being interested in the sale or lease of lands to the association ; or in any agreement as to compensation under the Military Manœuvres Act, 1897 ; or in any newspaper in which an advertisement relating to the affairs of the association is inserted ; or in any contract with the association as a shareholder in a joint-stock company ; or in any bargain or contract which the Army Council may by order permit an association to make with a member. A member shall not vote on any question in which he or such company is interested.

On a casual vacancy occurring in the association, another qualified person shall be appointed by the authority and in the manner by and in which the member so vacating was appointed.

A quorum of the association is one-fourth of the whole number of the association.

1240. The secretary is appointed and his salary paid by the association, subject to the approval of the Army Council. He cannot be removed from office without the consent of the Army Council. He is accountable to the association while holding office, and within three months after ceasing to hold office. The treasurer is appointed by the association, and may be a bank but must not be the secretary. A secretary and treasurer *must* be appointed ; other officials *may* be appointed, with the consent of the Army Council, if the association thinks necessary.

[1] Model Scheme, s. 10 (*a*).

General officers of any part of His Majesty's forces may attend meetings of the association and speak, but may not vote.[1]

Associations may appoint a joint committee for any purpose in which they are jointly interested.[2]

Every association has a general purposes committee, and no order for payment of any sum shall be made by the association, except in pursuance of a resolution of the association passed on the recommendation of the general purposes committee ; and no costs, debt, or liabilities exceeding £50 shall be incurred, except upon a resolution of the association passed on an estimate submitted by the general purposes committee. No act or proceeding of the association shall be questioned on account of any vacancy in their body or on account of the appointment of any member having been defective.

(ii) *Powers and Duties.*

1241. The three general duties of the association are : (1) To make itself acquainted and conform to the plan of the Army Council for the organisation of the Territorial Army within the county ; (2) to ascertain the military resources and capabilities of the county ; and (3) to render advice and assistance to the Army Council and to such officers as the Army Council may direct. The association has no power of command or training over any part of His Majesty's military forces.[3]

1242. The particular duties of the association are : (*a*) The organisation, maintenance, and administration of the Territorial Army at all times other than when called out for training or actual military service, or when embodied.[4] When it is called out or embodied the administrative charge of the force passes to the general officer commanding-in-chief ; but the association still has certain definite duties to perform.

(*b*) The recruiting for the Territorial Army, both in peace and war, and defining the limits of recruiting areas. The duty of recruiting does not cease when the force is called out or embodied.

(*c*) The provision and maintenance of rifle ranges, buildings, magazines, and sites of camps.

(*d*) Facilitating the provision of areas to be used for manœuvres.

(*e*) Arranging with employers of labour as to holidays for training, and ascertaining the times of training best suited to the circumstances of civil life.

(*f*) Establishing and assisting cadet battalions and corps and rifle clubs ; but no financial assistance out of money provided by Parliament may be given in respect of any person under sixteen in a battalion or corps in a school in receipt of a parliamentary grant.

(*g*) The provision of horses for the peace requirements of the Territorial Army. The association must provide the horses, wagons, and

[1] T.R.F.A., s. 1 (3) (*k*).
[2] *Ibid.*, ss. 4 (1) (*c*) and 5.
[3] *Ibid.*, s. 2 (1).
[4] *Ibid.*, s. 2 (2).

cycles required for camp, as well as for staff rides and instructional tours. The association is responsible for the conveyance of troops, horses, guns, cycles, stores, and other necessaries, except tents and camp equipment, to and from camp.[1]

(*h*) Providing accommodation for the safe custody of arms and equipment.

(*i*) The supply of requirements on mobilisation for the Territorial Army, as set forth in regulations made by the Army Council.

(*j*) The payment of separation and other allowances to the families of men of the Territorial Army when embodied or called out on active military service.

(*k*) The registration, in conjunction with the military authorities, of horses for any of His Majesty's forces.

(iii) *Expenses.*

1243. The Army Council shall pay to an association, out of money voted by Parliament for army services, such sums as, in the opinion of the Army Council, are required to meet the necessary expenditure connected with the exercise and discharge by the association of its powers and duties.[2]

An association must submit to the Army Council annually before 1st December an estimate of its requirements for the succeeding financial year (1st April to 31st March). A special estimate may be submitted at any other time.[3]

1244. Under the regulations made in pursuance of s. 3 of the Act, the grants for which an annual estimate is required are—

1. General administrative expenses, for which fixed grants are made per unit.[4]

2. Provision for upkeep of clothing and personal equipment, harness, and saddlery.[5]

3. Travelling grants in connection with drills, etc., outside the period of annual training in camp.[6]

4. Rent, structural repairs, repayment of principal and interest on loans for land and buildings, and payment of feu and other duties.[7] Property held by an association for the purposes of the Territorial Army is exempt from rating.[8]

Grants may also be made for services not included in the annual estimate, *e.g.* for horses, wagons, motors, and cycles for cyclist battalions requisitioned in accordance with regulations made by the general officer commanding-in-chief for annual training in camp, staff rides or instructional tours; for the cost of conveying troop-horses, guns, cycles,

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[1] Territorial Force Regulations, paras. 447, 475, and 476.
[2] T.R.F.A., s. 3 (1).
[3] *Ibid.*, s. 3 (2).
[4] Territorial Force Regulations, paras. 608–10.
[5] *Ibid.*, paras. 612–18.
[6] *Ibid.*, paras. 624–26 and Appendix 13.
[7] Territorial Force Regulations, paras. 627 *et seq.*
[8] Ryde on Rating, pp. 97, 98.

and stores to and from camp ; for compensation for the permanent loss of a horse, whether provided by an association or ridden by its owner, up to its certified value, with a maximum of £50 where the loss is the direct result of the performance of military duty ; and to meet the cost of special equipment on mobilisation.[1]

The association may spend its total grant on approved services among the units under its charge as it thinks fit, except in the case of the grant for the provision of cycles for cyclist battalions, which cannot be applied to any other object, unless with consent of the Army Council.[2]

The annual financial statement balanced to 31st March must be forwarded, after audit, to the Army Council not later than 1st July.

(iv) *Liability of Members.*

1245. The members of an association are protected by the Public Authorities Protection Act, 1893.[3] They are not under any pecuniary liability for any act done by them in their capacity as members of such association in carrying out any of the provisions of the Act.[4]

Section 12.—The Reserve Forces.

Subsection (1).—*General.*

1246. The Reserve Forces Act, 1882,[5] and amending Acts, 1890,[6] 1898,[7] 1899,[8] 1900,[9] 1906,[10] the Territorial and Reserve Forces Act, 1907,[11] and the Territorial Army and Militia Act, 1921,[12] provide for the establishment, regulation, and discipline of the reserve forces.

The army reserve consists of two classes, the numbers of which are fixed from time to time by Parliament. The first class is liable, when called out on permanent service, to serve either in the United Kingdom or elsewhere, and consists of " men who, having served in any of Her Majesty's regular forces, may either be transferred to the reserve in pursuance of the Army Act, or be enlisted or re-engaged in pursuance of this Act." The power of enlisting men into the first class was extended to the enlistment of men who have not served in His Majesty's regular forces and these from the militia.[13]

The second class is liable, when called out on permanent service, to serve in the United Kingdom only, and consists of men who, " (*a*) being out-pensioners of Chelsea Hospital or (on account of service in the Royal Marines) out-pensioners in Greenwich Hospital, or (*b*) having served in

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[1] Territorial Force Regulations, paras. 642–62, 667.
[2] T.R.F.A., s. 3 (3), and Territorial Force Regulations, paras. 668–70.
[3] 56 & 57 Vict. c. 61.
[4] T.R.F.A., s. 3 (7), and Territorial Force Regulations, para. 679.
[5] 45 & 46 Vict. c. 48.
[6] 53 & 54 Vict. c. 42.
[7] 61 & 62 Vict. c. 9.
[8] 62 & 63 Vict. c. 40.
[9] 63 & 64 Vict. c. 52.
[10] 6 Edw. VII. c. 11.
[11] 7 Edw. VII. c. 9.
[12] 11 & 12 Geo. V. c. 37.
[13] 7 Edw. VII. c. 9, s. 30, and 11 & 12 Geo. V. c. 37, s. 2.

any of Her Majesty's regular forces for not less than the full term of their original enlistment, may be enlisted or re-engaged in terms of this Act." [1] This latter class is practically extinct.

Subsection (2).—*Army Reserve.*

1247. The transfer, enlistment, and re-engagement of army reserve men is dealt with in the Reserve Forces Act, 1882, s. 4. Soldiers serving out of the United Kingdom may be transferred to the reserve without being required to return to the United Kingdom.[2] They may be called out by a Secretary of State to aid the civil power in the preservation of the public peace, and men resident in any town or district may be called out for the same purpose by the officer commanding the town or district, on the written requisition of a justice of the peace.[3] For not complying with the regulations in force an army reserve man may be tried and punished by court-martial, or may be convicted by a Court of summary jurisdiction and sentenced to a "fine of not less than forty shillings, and not more than twenty-five pounds, and in default of payment to imprisonment, with or without hard labour, for any term not less than seven days and not more than the maximum term allowed by law for non-payment of the fine." [4]

1248. The provisions dealing with the annual training of the reserve forces are: "(1) All or any of the men belonging to the army reserve may be called out for annual training at such time or times, and at such place or places within the United Kingdom, and for such period or periods, as may be prescribed, not exceeding, in any one year, twelve days or twenty drills. (2) Every man called out may, during his annual training, be attached to and trained with a body of the regular or auxiliary forces." [5] Reserves may be called out on permanent service. (1) "In case of imminent national danger or of any great emergency, it shall be lawful for Her Majesty in Council, by proclamation, the occasion being first communicated to Parliament, if Parliament be then sitting, or declared in Council and notified by proclamation if Parliament be not then sitting, to order that the army reserve shall be called out on permanent service." (2) Authority may be given by the proclamation to a Secretary for State to give all directions necessary for calling out the reserves. (3) Every man must attend at the time fixed, and from that time is deemed to be called out on permanent service. When such a proclamation is made and Parliament is not sitting, it must be summoned to meet within ten days.[6] The Reserve Forces and Militia Act, 1898, s. 13, as amended by the Territorial and Reserve Forces Act, 1907, s. 32 (2), and by the Territorial Army and Militia Act, 1921, gives power to call out without meeting of Parliament any number not exceeding six thousand of men

[1] Reserve Forces Act, 1882, s. 3. [2] 62 & 63 Vict. c. 40. [3] 45 & 46 Vict. c. 48, s. 5.
[4] 45 & 46 Vict. c. 48, s. 6, and 7 Edw. VII. c. 9. s. 35.
[5] 45 & 46 Vict. c. 48, s. 11; 7 Edw. VII. c. 9, s. 30 (3); and 11 & 12 Geo. V. c. 37, s. 3 and Schedule 2.
[6] 45 & 46 Vict. c. 48, ss. 12 and 13, amended by 11 & 12 Geo. V. c. 37.

who have agreed to be so called out during the first two years of their service in the first class of the reserve. When called out on permanent service, a reserve man is liable to serve so long as the term of service in the reserve force to which he belongs is unexpired, and for a further period not exceeding twelve months. A man called out on permanent service forms part of the regular forces, is subject to the Army Act, and may be appointed to any corps, or transferred within three months to any other corps in the same arm of the service.[1]

1249. Sec. 15 provides the punishment for non-attendance when called up. "When a man belonging to the army is called out for annual training or on permanent service, or is called out in aid of the civil power, and such man, without leave lawfully granted, or such sickness or other reasonable excuse as may be allowed in the prescribed manner, fails to appear at any time and place at which he is required upon such calling out to attend, he shall: (*a*) if called out on permanent service, or in aid of the civil power, be guilty, according to the circumstances, of deserting within the meaning of s. 12, or absenting himself without leave within the meaning of s. 15 of the Army Act, 1881; and (*b*) if called out for annual training, be guilty of absenting himself without leave, within the meaning of s. 15 of the Army Act, 1881. (2) A man belonging to the army or militia reserve who commits an offence under this section, or under ss. 12 or 15 of the Army Act, 1881, whether otherwise subject to military law or not, shall be liable as follows, that is to say: (*a*) be liable to be tried by court-martial, and convicted and punished accordingly; or (*b*) be liable to be convicted by a Court of summary jurisdiction, and to be sentenced to a fine of not less than forty shillings and not more than twenty-five pounds, and in default of payment to imprisonment, with or without hard labour, for any term not less than seven days and not more than the maximum term allowed by law for non-payment of the fine; and may in any case be taken into military custody."[2] Any person who induces or assists a reserve man to desert or absent himself without leave is liable on conviction by a Court of summary jurisdiction to a fine not exceeding twenty pounds. Subject to the provisions of the Act, His Majesty may, by order under the hand of a Secretary of State, make, revoke, and alter orders with regard to the government, discipline, and pay of the army reserve, and regulations have been made for the re-enlistment of reserve men in order to provide for the increase of the Army. Notices which require to be sent under the Act may be sent by post or published in the manner prescribed by the Act.[3]

1250. Any man belonging to the army reserve may be attached to a volunteer corps for the purpose of drill or training, and when so attached shall be a volunteer of such corps, without prejudice to his position as a man belonging to the army reserve.[4]

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[1] 45 & 46 Vict. c. 48, s. 14; amended by Edw. VII. c. 11; and 11 & 12 Geo. V. c. 37.
[2] 45 & 46 Vict. c. 48, s. 15, and 11 & 12 Geo. V. c. 37.
[3] 45 & 46 Vict. c. 48, ss. 17 and 20, and 11 & 12 Geo. V. c. 37.
[4] 53 & 54 Vict. c. 42, s. 2.

Subsection (3).—*Militia.*

1251. The power of enlisting men into the First Class of the Army Reserve under the Reserve Forces Act, 1882, has been extended by Part III. s. 30 (1) of the Territorial and Reserve Forces Act, 1907,[1] to the enlistment of men who have not served in His Majesty's regular forces, and men so enlisted are called Militiamen. This force is, by the Territorial Army and Militia Act, 1921,[2] now known as the Militia. A man who has been discharged from the Regular Army may also be enlisted into the Militia.[3]

Men enlisted into the First Class of the Army Reserve are liable, when called out on permanent service, to serve either in the United Kingdom or elsewhere.[4]

1252. A Militiaman may be called out for annual training, and in addition for a special course or courses at such place or places within the United Kingdom at such time or times and for such period or periods, not exceeding in the whole six months, as may be prescribed, in like manner and subject to the like conditions as he may be called out for annual training, and may during any such course be attached to or trained with any body of His Majesty's forces.[5] Provided that when one of the conditions of a man's enlistment is that he shall not be called out for training, whether special or annual, for a longer period than the period specified in his attestation paper, he shall not be liable under this section to be called out for any longer period.

1253. A Militiaman shall, if he so agrees in writing, be liable during the whole of his service in the Army Reserve, or during any such part of that service as he so agrees, to be called out on permanent service without such proclamation or communication to Parliament as is mentioned in s. 12 of the Reserve Forces Act, 1882, and the calling out of men under this section shall not involve the meeting of Parliament as required by s. 13 of that Act. The number of men so liable shall not at any one time exceed 4000, and the power to call them out shall not be exercised except when they are required for service outside the United Kingdom when warlike operations are in preparation or progress. Any exercise of the power of calling out men under this section shall be reported to Parliament as soon as may be.[6]

Sec. 33 gives power by orders and regulations under the Reserve Forces Act, 1882, to form Militiamen into regiments, battalions, or other military bodies.

Section 13.—Military Law.

Subsection (1).—*History.*

1254. Before the institution of a standing army, Military law existed only in time of war. On the outbreak of war, Articles of War were issued

[1] 7 Edw. VII. c. 9.
[2] 11 & 12 Geo. V. c. 37, s. 2.
[3] Army (Annual) Act, 1905, s. 4.
[4] Reserve Forces Act, 1882, s. 3.
[5] T.R.F.A., s. 30 (2)
[6] *Ibid.*, s. 32.

by the Crown or the Commander-in-Chief, under authority from the Crown, given in his commission. The Bill of Rights [1] declared the institution of a standing army in time of peace without the consent of Parliament to be illegal. In 1689 the first Mutiny Act [2] was passed, the preamble of which expressly declared "that the raising or keeping of a standing army within the kingdom, in time of peace, unless it be with consent of Parliament, is against law," and these words have now been transferred into the Annual Act which brings the Army Act into force. From 1689 to 1878, with the exception of short periods, annual Mutiny Acts were passed. Till 1712 the Mutiny Acts did not extend to the King's dominions abroad; but in that year power was given to the Crown to make Articles of War for the regulation of the army in His Majesty's dominions beyond the seas in time of peace. In 1803 the Mutiny Act and statutory Articles of War were extended to the army within or without the Crown's dominions.[3] In 1879 the Army Discipline and Regulation Act [4] was passed, consolidating the provisions of the Mutiny Act and Articles of War made under the authority of that Act. This Act was repealed and re-enacted with certain amendments by the Army Act of 1881,[5] which, in order to become effective, requires to be brought into operation annually by a separate Act. This Annual Act specifies the number of troops to be maintained for the current year, and introduces any amendments which may be necessary in the principal Act. Since the institution of a separate Air Force the Annual Act, known as the Army and Air Force (Annual) Act deals with both services. This is also the Act which authorises the maintenance of the Royal Marines. The Army Act, whenever reprinted, incorporates all alterations made thereto, and references to the Army Act are to the Army Act as so reprinted in 1925.[6]

Subsection (2).—*Jurisdiction.*

1255. The Army Act, King's Regulations, and Army Orders form the code of military law by which the army is governed. The scope and application of military law is dealt with in Part V. of the Army Act.

1256. Persons subject to military law are:

1. All officers of the regular forces on the active list, or who are employed on military service under the orders of such an officer or officers of the Air Force attached to the regular army forces, and all non-commissioned officers and men of the regular forces or airmen attached thereto, and all pensioners employed in military service.

2. All officers of the Territorial Army who are on the active list, at all times, and those who are in the reserve, at such times as they are called up or doing duty; all non-commissioned officers and men of the Territorial Army when being trained or exercised, when embodied

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[1] 1 Will. & Mary, Sess. ii. c. 2.
[2] 1 Will. & Mary, c. 5.
[3] 43 Geo. III. c. 20.
[4] 42 & 43 Vict. c. 33.
[5] 44 & 45 Vict. c. 58.
[6] 48 & 49 Vict. c. 8, s. 8 (3).

or when called out for military service; also all officers, non-commissioned officers and men of the Volunteers while on duty or with their units or attached to some regular or auxiliary unit. If, however, such persons, who are not otherwise subject to military law, are about to enter upon some service which will render them so liable, their commanding officer is obliged to inform them that they will become so subject, and to give them an opportunity of abstaining from entering upon that service.

3. Officers, non-commissioned officers and men of any force raised in India or a colony when attached to or serving with the regular, reserve, or auxiliary forces in the United Kingdom, or when on active service, in regard to any matters falling under military law and not expressly dealt with by enactments of India or that colony.

4. All Reserve Officers, if holding commissions as officers in the Militia, at all times, and if not holding such a commission, when ordered on any duty or service for which they are liable; and all non-commissioned officers and men belonging to the Army Reserve or Militia, when called out for training and exercise, or when called out on permanent service or for duty in aid of the civil power.

5. All persons who are employed by or are in the service of troops on active service, or who are followers of or accompany such troops, and any person accompanying a force on active service who holds a pass from the commanding officer entitling him to be treated on the footing of an officer, if such pass is revocable at the pleasure of the commanding officer.

1257. Persons who commit an offence while subject to military law, for which they are liable, if found guilty, to be punished under that law, may be taken into custody, tried, and punished after the units to which they belonged have ceased to be subject to military law. A person who has himself ceased to be subject to military law may be so dealt with for offences committed while he was still subject to such law, but his trial must be commenced within three months after he has ceased to be subject to military law. This limitation does not apply to cases where the offence is mutiny, desertion, or fraudulent enlistment, nor does it apply to trial by a Civil Court where the offence is one which is triable by such a Court as well as by a court-martial; nor does it apply to persons attached to or seconded for service with the military forces.[1] Except where the offence is mutiny, desertion, or fraudulent enlistment no person subject to military law can be tried by court-martial for an offence committed more than three years before that trial commenced, and even then he is not to be tried for the offences of desertion or fraudulent enlistment if he has served in an exemplary manner for not less than three years in any corps of the regular forces. This does not apply to desertion on active service.[2]

1258. Where a person subject to military law has been sentenced to

[1] Army Act, s. 158 (1). [2] *Ibid.*, s. 161.

penal servitude, imprisonment, or detention, he remains subject thereto for the duration of that sentence, notwithstanding the fact that he would by dismissal or otherwise, have ceased, but for this provision, to be subject to military law.[1]

1259. A person subject to military law is deemed to be tried at the place where the offence was committed,[2] but may be tried in any other place where the offender may be if it is subject to the jurisdiction of an officer authorised to convene a court-martial In this event, however, the sentence is not to exceed that which could competently have been awarded at the place where the offence was committed.

1260. No person subject to military law who has been acquitted or convicted of an offence by a competent Civil Court is liable to be tried in respect of that offence by a military court ; [3] and if he has already been punished by a court-martial in respect of an offence for which he is later tried by a Civil Court, that Court is to take into consideration in awarding punishment such punishment as has already been undergone.[4] Otherwise nothing exempts an officer or man from being proceeded against in the ordinary course of law except in regard to certain offences which are expressly declared by the Army Act not to be crimes.[5]

Subsection (3).—*Discipline.*

1261. Discipline, including crimes, punishments, and courts-martial, is dealt with in Part I. of the Army Act. The discipline of troops embarked as passengers in any of His Majesty's ships is regulated by an Order in Council.[6] Soldiers can be tried and punished for offences against the ordinary criminal law as if they were civilians.

Subsection (4).—*Civil Rights and Disabilities of Soldiers.*

1262. A soldier while in the service cannot change his domicile or his parish of settlement. If he marries without the consent of the military authorities, his wife will not be provided for by those authorities, nor can he be punished for deserting or neglecting to maintain his wife or family ; but special provision has been made to compel him to maintain his wife and family or illegitimate child, and a certain sum may be deducted from his pay for that purpose, but only after a decree has been obtained or after the circumstances have been investigated to the satisfaction of the Army Council.[7] Certain restrictions are imposed upon a soldier's creditors ; these, however, do not affect the soldier's private property, but only his person, pay, or military equipment.[8] An officer or soldier cannot legally charge or assign his pay or pension. An officer or soldier on actual military service is entitled to make, as to his moveable estate, a nuncupative will. Officers are not required

[1] Army Act, s. 158 (2).
[2] *Ibid.*, s. 160.
[3] *Ibid.*, s. 162 (6).
[4] *Ibid.*, s. 162 (1).
[5] *Ibid.*, s. 162 (2).
[6] 6th February 1882.
[7] Army Act, s. 145.
[8] *Ibid.*, s. 144.

to pay licence duty for any servant who is a soldier and who is employed in accordance with the regulations of the service. Officers on full pay are exempt from serving on juries, and they are prohibited from joining the directorate of any public or private company, without the consent of the Commander-in-Chief.[1] Officers and soldiers, if on the roll, are entitled to vote at parliamentary elections, and, if themselves elected, to attend the House of Commons. No officer of the regular forces who is on the active list may hold any municipal office, but he may be a member of a county council.[2]

SUBSECTION (5).—*Offences.*

1263. Certain acts or omissions are declared by military law to be offences and are punished, when done or omitted by a person subject to military law, according to the provisions of the Army Act. Every offence may now be punished by a lesser punishment than the one mentioned in that particular section or part of the Act which deals with the offence.

The principal offences in Military law are : (1) Offences in respect of Military Service, (2) Mutiny, and (3) Desertion.

(i) *Offences in respect of Service.*

1264. Offences in respect of Military Service may be divided into three groups : (*firstly*) those, such as the shameful abandonment of garrisons or posts, holding treacherous communication with the enemy, assisting or aiding the enemy, or displaying cowardice, which are punishable with death ;[3] (*secondly*) offences, such as creating alarm and despondency or failing to make any effort to rejoin his force when taken prisoner, which are punishable with penal servitude ;[4] and (*thirdly*) certain offences, such as leaving a post without orders or being drunk or asleep when acting as sentinel, which are punishable by death if committed on active service, or if not on active service, by imprisonment.[5]

(ii) *Mutiny.*

1265. "Mutiny implies collective insubordination, or a combination of two or more persons to resist, or to induce others to resist, lawful military authority."[6] Sec. 7 of the Army Act provides as follows : "Every person subject to military law who commits any of the following offences ; that is to say—(1) causes, or conspires with any other persons to cause, any mutiny, or sedition in any forces belonging to Her Majesty's regular, reserve, or auxiliary forces, or navy ; or (2) endeavours to seduce any person in His Majesty's naval, military, or air forces from allegiance to His Majesty, or to persuade any person in any of His Majesty's naval, military, or air forces to join in any mutiny or sedition :

[1] King's Regulations, para. 449. [2] Army Act, 146.
[3] *Ibid.*, s. 4. [4] *Ibid.*, s. 5. [5] *Ibid.*, s. 6.
[6] Manual of Military Law, War Office, 1914, p. 15.

or (3) joins in, or being present does not use his utmost endeavours to suppress, any mutiny or sedition in any forces belonging to His Majesty's naval, military, or air forces; or (4) coming to the knowledge of any actual or intended mutiny or sedition in any forces belonging to His Majesty's naval, military, or air forces, does not without delay inform his commanding officer of the same, shall on conviction by court-martial be liable to suffer death, or such less punishment as in this Act mentioned." Civilians who endeavour to seduce persons serving in His Majesty's sea or land forces from allegiance to His Majesty, or to incite such persons to commit any traitorous act, may be sentenced by a Criminal Court to penal servitude for life.[1]

(iii) *Desertion.*

1266. The offence of deserting or attempting to desert His Majesty's service implies an intention either to escape some particular important service, or not to return to His Majesty's service, without being discharged or without leave of absence; and intention is of the essence of the offence. Mere length of absence, or the fact that the offender has gone away a long distance, does not necessarily imply intention to desert, but the fact that a man has disguised himself, or conceals himself when called upon for any important duty, such as foreign service, is strong evidence of intention.[2] "Every person subject to military law who commits any of the following offences; that is to say, (*a*) deserts or attempts to desert His Majesty's service; or (*b*) persuades or endeavours to persuade, procures or attempts to procure, any person subject to military law to desert from His Majesty's service, shall, on conviction by court-martial—if he committed such offence when on active service, or under orders for active service, be liable to suffer death, or such less punishment as in this Act mentioned; and if he committed such offence under any other circumstances, be liable for the first offence to suffer imprisonment, or such less punishment as in this Act mentioned; and for the second or any subsequent offence, to suffer penal servitude, or such less punishment as in this Act mentioned."[3] A previous offence of fraudulent enlistment may be reckoned as a previous offence for the purpose of higher punishment.

1267. An offender is liable, on conviction or confession of desertion, to general service, or transfer to such corps of the regular forces as the competent military authority may from time to time order,[4] but this does not apply to the Royal Marines.[5] A deserter, upon conviction by court-martial or confession, also forfeits the whole of his prior service,[6] and his pay while absent on desertion or undergoing imprisonment;[7]

[1] 37 Geo. III. c. 70; 7 Will. IV. and 1 Vict. c. 91.
[2] Manual of Military Law, 1914, p. 18.
[3] Army Act, s. 12.
[4] *Ibid.*, s. 83 (7).
[5] *Ibid.*, s. 179 (12).
[6] *Ibid.*, s. 73 (1), (3), s. 79 (2).
[7] *Ibid.*, s. 138 (1).

but the forfeited service may be restored,[1] and the deduction of pay remitted [2] by a Secretary of State. Regulations with regard to the disposal of the effects of a deserter are contained in the Regimental Debts Acts, 1893,[3] s. 23, and the rules made in pursuance of that Act by Royal Warrant.[4] A soldier on furlough, if detained by sickness or other casualty, may, if there is no officer at hand for the performance of military duty of the rank of captain, get an extension, not exceeding one month, from a justice of the peace, who must certify the extension and the cause thereof to the soldier's commanding officer or a Secretary of State, and such an extension will prevent him from being treated as a deserter or absent without leave.[5]

1268. Every person subject to military law who, "being a soldier, falsely states to his commanding officer that he has been guilty of desertion or of fraudulent enlistment, or of desertion from the navy, or has served in and been discharged from any portion of the regular forces, reserve forces, or auxiliary forces, or the navy, shall, on conviction by court-martial, be liable to suffer imprisonment, or such less punishment as is in this Act mentioned." [6] Deserters found in the enemy's ranks are not entitled to the privileges of prisoners of war, and cannot, without special mention, claim the benefit of any general agreement made in regard to prisoners of war.[7]

1269. A prisoner charged before a court-martial with desertion may be found guilty of attempting to desert or of being absent without leave, and a prisoner similarly charged with attempting to desert may be found guilty of desertion or of being absent without leave.[8] Every person subject to military law who assists any person subject to military law to desert, or, being cognisant of any desertion or intended desertion of a person subject to military law, does not forthwith give notice to his commanding officer, or take any steps in his power to cause the deserter, or intending deserter, to be apprehended, is liable to imprisonment, or such less punishment as is mentioned in the Act.[9]

1270. Apprehension of suspected deserters may be effected by any constable, or, if none can be met with, by "any officer, soldier, or other person"; or a justice of the peace, magistrate, or other person having power to issue a warrant, may, if satisfied by evidence on oath that a deserter is, or is reasonably suspected to be, within his jurisdiction, issue a warrant for his apprehension. The suspected person must forthwith be brought before a Court of summary jurisdiction, and the Court, if satisfied by evidence on oath or by confession that such person is a deserter, shall cause him either to be delivered to military custody, or to be committed to prison for a reasonable time, until he can be so

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[1] Army Act, s. 79.
[2] *Ibid.*, s. 139.
[3] 56 & 57 Vict. c. 5.
[4] Manual of Military Law, 1914, p. 784.
[5] Army Act, s. 173.
[6] *Ibid.*, s. 27 (3).
[7] Vattel, ii. 173; Heffter, 245; Halleck, ii. 93.
[8] Army Act, s. 56 (3), (4).
[9] *Ibid.*, s. 14.

delivered. The Court shall in either case transmit to a Secretary of State (Secretary for War) a descriptive return in relation to such deserter in accordance with the form given in Schedule 4, for which the clerk shall be entitled to a fee of two shillings. The return also states the person to whom the reward for apprehension is due, and the amount—five shillings, ten shillings, fifteen shillings, or twenty shillings—which the Court think should be granted.[1] Desertion is not a crime at common law in Scotland, but to seduce a soldier or sailor to desert is criminal.[2]

Subsection (6).—*Punishments.*

1271. The scale of punishments which may be awarded under military law includes, in addition to those already mentioned, in the case of officers—cashiering ; dismissal, forfeiture of seniority, and reprimand or severe reprimand.[3] These punishments can only be awarded by sentence of a court-martial. An officer, before he is sentenced to penal servitude or imprisonment, must be cashiered.[4] The whole or any part of lost seniority may be restored by the Army Council.[5] In the case of non-commissioned officers the scale of punishments includes detention for a period not exceeding two years ; discharge with ignominy from His Majesty's service ; forfeiture of seniority or rank ; reprimand and severe reprimand and certain forfeitures, fines, and stoppages of pay. In the case of men the scale of punishments includes detention as above and forfeitures, fines, and stoppages of pay. Warrant officers not holding an honorary commission may be sentenced by court-martial to be dismissed, reprimanded, or reduced in seniority or rank.[6] On active service field punishments are administered. These are governed by rules approved by Parliament.[7]

Subsection (7).—*Military Police.*

1272. There are in connection with the Army, corps of military mounted police and corps of military foot police, which form the organised body employed within the army for police purposes. The corps usually consist of steady, intelligent soldiers, who at home act under the orders of the commanding officer, and abroad under his orders or the orders of a provost-marshal appointed by the commanding officer. They arrest and detain for trial all persons, subject to military law, committing offences. They also generally attend to sanitary arrangements. In all military matters the police of an army possess summary powers somewhat similar to those of constables in the civil police force.

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[1] Army Act, s. 154, and Fourth Schedule.
[2] Hume, i. 528, 260 ; ii. 34, 41 ; Macdonald, p. 237.
[3] Army Act, s. 44.
[4] *Ibid.*, s. 44 (2).
[5] *Ibid.*, s. 44 (29).
[6] *Ibid.*, s. 182.
[7] *Ibid.*, s. 44 (9).

SUBSECTION (8).—*Judge Advocate.*

1273. A judge advocate is the legal assessor of a court-martial. The Judge Advocate-General is the adviser of the Crown in reference to matters of military law.

SUBSECTION (9).—*Courts-Martial.*

1274. The military Courts are known as courts-martial and are of three degrees. General courts-martial, district courts-martial, and field general courts-martial.[1] Their constitution and proceedings are regulated by the Army Act, and the rules of procedure made in pursuance of that Act.

1275. A general court-martial can try an officer. It is convened by His Majesty or some officer authorised to convene it. It consists of not less than five officers, all of whom must have held their commissions for three whole years and four of whom must not be below the rank of captain. A general court-martial has power to award the punishment of death or penal servitude, but a district court-martial cannot do so.

1276. A district court-martial consists of not less than three officers, each of whom must have held a commission for not less than two whole years.

1277. With the exceptions above stated both kinds of court-martial may deal with offences. No officer under the rank of captain may be a member of a court-martial for the trial of a field officer. No sentence of death may be passed on any prisoner without the concurrence of two-thirds of the officers serving on the court-martial. The president of a Court is appointed by order of the authority convening the Court and, unless under very exceptional circumstances, is not to be an officer below the rank of field officer.[2] The accused has a right to object, for any reasonable cause, to any member, including the president. The remainder of the Court considers the objection, and if the objection is to the president and is allowed by one-third or more of the officers considering it, the Court adjourns for the appointment of a new president. If the officer objected to is not the president, the question of the validity of the objection is decided by a bare majority. The names of the officers who will compose the Court are read over to the accused on their first assembling and before they are sworn.[3] The form of oath to be administered to every member of every court-martial is set forth in the Army Act.[4] The prisoner is to have notice of the charge against him and an opportunity of preparing his defence and communicating with his legal adviser or friend and witnesses. Neither the officer who convenes the court-martial nor the prosecutor nor any witness can sit as a member of a court-martial.

[1] Army Act, 1881, as amended, ss. 48, 49.
[2] Army Act, s. 48 (9). [3] *Ibid.*, s. 51. [4] *Ibid.*, s. 52 (1).

1278. A field general court-martial is a less formal court, and some of the rules stated above are not applicable to that Court. A field general court-martial may only be convened to deal with offences committed overseas or on active service where, in the opinion of the officer commanding the troops in question, it is not practicable to convene a general court-martial. It is convened by the officer commanding the corps or detachment. Where the offence is not committed on active service the officer in command of the corps or detachment cannot convene such a court-martial to try any person subject to military law who is not under his command, unless the offence charged is against the property or person of an inhabitant of or resident in the county in which the offence is alleged to have been committed.[1] A field general court-martial consists of not less than three officers, unless the officer convening it is of opinion that three officers are not available having due regard to the public service, in which case the court-martial may consist of two officers. If there are only two members, such a court cannot inflict any punishment in excess of field punishment or imprisonment. A sentence of death cannot be passed except with the concurrence of all the members of the Court.[2] The convening officer may himself preside or appoint another officer who, when possible, should not be below the rank of captain.

1279. In all courts-martial an equality of votes on the finding is to be a finding of acquittal. In the case of an equality of votes on the sentence or on any question arising after the commencement of the trial, except the finding, the president has a second or casting vote.[3]

1280. No conviction or sentence by a court-martial is valid until confirmed by a superior authority. In the case of a general court-martial the confirming authority is His Majesty or some officer holding authority to do so from His Majesty. In the case of a district court-martial the confirming authority is an officer specially authorised or an officer deriving authority from him. In the case of a field general court-martial the confirming authority is an officer authorised to confirm sentences of a general court-martial, or when on active service an officer who is authorised under the rules for field general courts-martial to confirm such sentences. If the sentence awarded by a field general court-martial is death or penal servitude it requires also to be confirmed by the general or field officer commanding the force with which the person under sentence is present at the date of his sentence, before it can be carried into effect.[4] A finding of acquittal does not require to be confirmed.[5] No member of a court-martial can be the confirming authority of the sentence of the court-martial of which he was a member. Under certain exceptional cases this rule may be relaxed where the Court is a field general court-martial.[6] The confirming authority may mitigate or remit the punishment or commute it for a lesser one.[7]

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[1] Army Act, s. 49 (1) (*a*).
[2] *Ibid.*, s. 49 (2).
[3] *Ibid.*, s. 53 (8).
[4] *Ibid.*, s. 54 (1).
[5] *Ibid.*, s. 54 (2).
[6] *Ibid.*, s. 54 (4).
[7] *Ibid.*, s. 57 (1).

1281. Members of courts-martial are amenable to the jurisdiction of the civil Courts in respect of acts done by them either without jurisdiction or in excess of jurisdiction, but any action against them must be commenced within six months of the act complained of.[1] In the case of a person subject to military law, if the act complained of only affects his military position and character a Court of law will not interfere and the only appeal lies to His Majesty.[2] The War Department is not liable in damages on account of the wrongful acts or illegal proceedings of a court-martial.[3]

1282. The rules of evidence applicable to a court-martial wherever held are the same as those which are followed in civil Courts in England.[4] The accused may be represented by counsel who must conduct himself in a proper manner. Any conduct which would be liable to censure if it took place before the High Court in England is to be deemed liable to censure by the court-martial. All rules laid down for the practice of courts-martial are binding on counsel appearing before them.[5] Witnesses may be summoned to attend a court-martial, and if a witness fails to appear, or when he or she does appear fails to produce documents which it is in his or her power to produce, or fails to answer any proper question, the president may certify the offence to any Court of law in the part of His Majesty's dominions where the offence is committed.[6] It will then be dealt with in the ordinary course of law.

1283. If a charge is made against a person subject to military law, and he is an officer below the rank of field officer or is a warrant officer, and the commanding officer of that person does not consider it a case which ought to go to a court-martial, he may refer the case to be dealt summarily by a general officer or colonel commandant. If the person is a soldier, the commanding officer may deal summarily with the case himself.[7] In the latter case he may award sentence of detention not exceeding twenty-eight days. In addition to or without any other punishment he may award such other minor punishment as he is for the time being authorised to award. A minor punishment should not be awarded for an offence for which detention exceeding seven days is awarded.[8]

After the commanding officer has heard the evidence and is of opinion that he may deal with the case, and the finding involves forfeiture of ordinary pay or a punishment other than a minor punishment, he must ask the soldier if he wishes to be dealt with summarily or to be tried by a district court-martial, and if the soldier chooses the latter the commanding officer is to take steps to bring him to trial by a district court-martial. Otherwise he is to proceed to deal with the case summarily.[9]

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[1] Public Authorities Protection Act, 1893; 56 & 57 Vict. c. 61.
[2] *Dawkins* v. *Lord Rokeby*, 1875, L.R. 7 H.L. 744; and Manual of Military Law, 1914, p. 129.
[3] *Smith* v. *Lord Advocate*, 1897, 25 R. 112.
[4] Army Act, s. 128.
[5] *Ibid.*, s. 129.
[6] *Ibid.*, ss. 125, 126.
[7] *Ibid.*, s. 46.
[8] *Ibid.*, s. 46 (2), (*e*).
[9] *Ibid.*, s. 46 (8).

1284. Officers below the rank of field officers and warrant officers may be dealt with summarily by any general officer, not below the rank of major-general, who is authorised to do so by the Army Council, or by any general officer or colonel commandant who is authorised to convene a general court-martial.[1] Such authority may dismiss the case or send it to a court-martial or, after hearing the evidence, or reading an abstract, if the accused consents thereto in writing, deal with it summarily. In the case of an officer the punishments which may be awarded are forfeiture of seniority of rank, or forfeiture of service for the purposes of promotion, or reprimand, or severe reprimand. In the case of warrant officers the punishments are forfeiture of seniority of rank, severe reprimand, or reprimand and authorised deductions from his ordinary pay. In every case, except where the punishment to be awarded is a severe reprimand or a reprimand, the accused may elect to be tried by court-martial.[2]

1285. Where a sentence of a court-martial has been confirmed it may be remitted, mitigated, or commuted for a lesser punishment by His Majesty, or the Army Council, or the officer commanding the district or station where the offender may for the time be, or any prescribed officer. Such a power is not to be exercised by an officer who holds an inferior command to that of the officer who confirmed the sentence, except with special authority.[3] Where a soldier is sentenced to penal servitude, imprisonment, or detention the confirming authority may direct that the soldier be not committed to prison or detention barracks until the order of a superior military authority have been obtained, and the superior military authority may suspend the sentence, and the soldier, if already committed, is then to be released.[4] A suspended sentence is to be reviewed at intervals of not more than three months and may be remitted.[5] A soldier who has been sentenced to and is undergoing penal servitude may be discharged by the Army Council, or any officer authorised by them, at any time before he is moved to a penal servitude prison,[6] and where the person is a military prisoner or a soldier undergoing detention, he may at any time be discharged [7] by the authorised discharging authority.[8]

Section 14.—Civil Penalties for Offences under Army Act.

1286. Legal penalties may be enforced for certain matters declared to be offences by the Army Acts. Any person falsely representing himself to be a deserter shall on summary conviction be sentenced to be imprisoned for a term not exceeding three months.[9] Persuading an officer or soldier to desert or aiding him or concealing him when so doing is punishable on summary conviction with imprisonment for a term not exceeding six months.[10] Interference with military duties,

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[1] Army Act, s. 47 (1).
[2] *Ibid.*, s. 47 (2), (3).
[3] *Ibid.*, s. 57 (2), (3).
[4] *Ibid.*, s. 57 A (1), (2), (3).
[5] *Ibid.*, s. 57 A (5).
[6] *Ibid.*, s. 59 (3), (4).
[7] *Ibid.*, s. 63 (6).
[8] *Ibid.*, s. 64 (3).
[9] *Ibid.*, s. 152.
[10] *Ibid.*, s. 153.

or injuring any soldier with a view to enable such man to avoid military service, is punishable on summary conviction with imprisonment for a term not exceeding six months or a fine not exceeding one hundred pounds, or both.[1] The purchasing from soldiers of regimental necessaries, equipment, and stores, or of military or air force decorations, may be punished on summary conviction by a fine not exceeding twenty pounds, together with a payment of treble the value of the article, or imprisonment for a term not exceeding six months, or both. Any unauthorised person who uses or wears any military or air force decoration, medal, badge, or wound stripe, or anything so nearly resembling the same as to be calculated to deceive, is liable on summary conviction to a fine not exceeding twenty pounds or to imprisonment for a term not exceeding three months. This does not prohibit the wearing of brooches or ornaments representing ordinary regimental badges.[2]

Section 15.—Billeting and Impressment of Carriages.

1287. Billeting is now authorised under Part III. of the Army Act, and may be considered (*first*) as billeting in case of emergency, and (*second*) as billeting except in case of emergency.

Subsection (1).—*Billeting in Case of Emergency.*[3]

1288. Where directions have been given for embodying all or any part of the Territorial Force, His Majesty, by order distinctly stating that a case of emergency exists, and signified by a Secretary of State, and also in Ireland the Lord-Lieutenant by a like order, signified by the Chief Secretary or Under-Secretary, may authorise any general or field officer commanding His Majesty's regular forces in any military district or place in the United Kingdom to issue a billeting requisition. In application to Northern Ireland the reference to the Lord Lieutenant is to be construed as a reference to the Governor of Northern Ireland.[4] The reference to the Chief Secretary is to be construed as a reference to a Secretary of State, and the reference to the Under-Secretary does not apply.[5] Any officer so authorised may issue a billeting requisition reciting the order and requiring chief officers of police to provide billets in such places and for such numbers of officers and soldiers, and their horses, and for such periods as may be specified in the requisition. The expression "chief of police" in Scotland has the same meaning as in the Police Act, 1890.[6]

1289. The provisions as to ordinary billeting apply to billeting under such a requisition, subject, however, to the following modifications.

[1] Army Act, s. 153 A. [2] *Ibid.*, s. 156 A. [3] *Ibid.*, s. 108 A.
[4] 13 Geo. V. c. 2, sess. ii. First Schedule 1 (1).
[5] Government of Ireland (Adoption of Enactments) (No. 3) Order, 1922.
[6] 53 & 54 Vict. c. 45.

The occupiers of all public buildings, dwelling-houses, warehouses, barns, and stables, as well as the keepers of victualling-houses, shall be liable to billets. The powers and duties imposed on constables shall be exercised and performed by chief officers of police. A Court of summary jurisdiction, but not a justice of the peace, may require a chief officer of police to give an account in writing of the numbers billeted, together with the names of the occupiers and the locality of the places in which they are billeted. The prices to be paid to an occupier other than the keeper of a victualling-house shall be such as may be fixed by the Army Council with consent of the Treasury. Compensation shall be paid by the Army Council in respect of any damage caused by any officer or soldier billeted under this section to the premises in which he is billeted. In Scotland the amount of compensation in the event of disagreement is to be determined in the manner provided by the Local Government (Scotland) Act, 1894.[1] These provisions as to billeting apply also to women enrolled for employment by the Army Council.

SUBSECTION (2).—*Billeting except in Case of Emergency.*

1290. The police authority of any place annually make out a list of victualling-houses liable to billets, specifying the situation and character of each victualling-house, and the number of soldiers and horses who may be billeted on the keeper thereof.[1] The list is open to inspection, and any person who feels aggrieved thereby may complain to any Court of summary jurisdiction; and the Court may order the list to be amended as it thinks just.[2] The list so made out merely determines the proportion in which the billets are to be distributed among the keepers of victualling-houses, and is not conclusive as to the number of officers, soldiers, or horses for whom the keeper of the victualling-house shown in the list may be required to find accommodation on an emergency.[3] The accommodation required is requisitioned by writing issued under authority of His Majesty. Such writing is known as a "route," and states the number of troops and horses requiring billets and the line of march or route along which the troops are being moved. This "route" is presented to a constable, who thereupon allocates from his annual list a sufficient number of the most adjacent billets to accommodate the troops and horses. Unless sanctioned by a justice of the peace, billets must be within one mile of the place mentioned in the route.[4]

1291. Persons on whom troops are thus billeted are required to furnish both officers and men with lodging and attendance, and to allow the soldier to use the fire for cooking his food, and to supply him with candles, vinegar and salt, and the necessary utensils. Or they may be required to supply the soldier with meals and may be required to furnish

[1] 57 & 58 Vict. c. 58, s. 25 (10).
[2] Army Act, s. 107.
[3] *Sharratt* v. *Scolney*, [1892] 2 Q.B. 479.
[4] Army Act, s. 103.

him with not more than two days rations.[1] Officers pay for their own food. Payment for billets and other food including forage is made according to a scale authorised by Parliament.[2]

Subsection (3).—*Impressment of Carriages.*

1292. The impressment of carriages for military purposes is also regulated by the Army Act, Part III.,[3] and provides a supply of carriages and other vehicles forming regimental baggage and stores on the march. Such vehicles and horses are deemed to be hired. Impressment is carried out by means of a warrant from a justice of the peace. This warrant requires the constabulary to provide the vehicles and horses asked for to the number specified in the warrant. A fee of one shilling is payable to the clerk of the justice for the warrant.[4] Payment is made at the rate usually recognised in that district as the rate for hiring of such vehicles. If any dispute arises the rate is to be fixed by certificate of the County Court judge, and his decision is final. If the Army Council tender a sum in payment, that sum is deemed to be the proper rate unless complaint is made within three weeks. Payment may be made at the time, and one-third of the rate may be demanded before the vehicle is loaded. If payment be not made at the time, the officer or non-commissioned officer is to sign an account which may be sent to the Army Council.[5] As alternative or in addition to this method an annual list on lines similar to that made out for billets may be kept, and if the Army Council order that this be done a duty is laid on the owners of horses in that district to furnish a return of these horses annually.[6]

1293. Certain provisions are laid down in the Army Act dealing with the supply of carriages, vessels, etc., in cases of emergency. His Majesty may, by order distinctly stating that a case of emergency exists, and signified by a Secretary of State, authorise any field or general officer commanding regular forces to issue a requisition. The officer so authorised issues this requisition under his own hand and it requires justices of the peace to issue the necessary warrants. Carriages of every description, including motors, may be requisitioned, also all horses, and vessels, including barges, and the requisition may also cover food, forage, and stores of every description. Normally vehicles, horses, etc., are deemed to be hired but, if the Army Reserve has, by Proclamation, been called out on permanent service, the authority to issue a requisition for the hiring of carriages, etc., may also extend to the issue of a requisition requiring provision of carriages, horses, vessels, food, forage, and stores for purchase. And such requisition may also prohibit the sale and purchase of horses and carriages to or by any person other than a person appointed by the Army Council.[7]

[1] Army Act, Second Schedule, Part I.
[2] Army Act, s. 106 (3).
[3] Part III, ss. 112–21.
[4] Army Act, s. 112.
[5] *Ibid.*, s. 113.
[6] *Ibid.*, s. 114.
[7] *Ibid.*, s. 115.

Section 16.—Military Manœuvres.

1294. Military Manœuvres are regulated by the provisions of the Military Manœuvres Act of 1897,[1] as amended by the Act of 1911.[2] His Majesty may, by Order-in-Council, authorise the execution of military manœuvres within specified limits and during a specified period not exceeding three months. The same limits, or any part thereof, must not be specified more than once in any period of five years, unless with the consent of the county or borough within which the area is situated.[3] A draft of the order must be sent, not less than six months (four months if the order is sent to the authorities specified before 31st March) before the order is to come into force, to each county council, county borough council (defined to mean in Scotland royal burgh, parliamentary burgh, or burgh under the Burgh Police (Scotland) Act, 1892), district council (in Scotland the district committee acting under the Local Government (Scotland) Act, 1889, or the county council, where no such district committee exists), and parish council wholly or partly within the specific limits. Notice of intention to make the order must be advertised for three months in at least two newspapers circulating in the district. The draft, before being submitted to His Majesty in Council, must be laid before each House of Parliament for thirty days on which the House is sitting, and it cannot be submitted unless both Houses present an address to His Majesty praying that the order may be made.

1295. Where an Order-in-Council has been made authorising the execution of military manœuvres, the authorised forces may, under the direction of the Secretary of State, and within the specified period and limits: (*a*) pass over and encamp, construct military works, not of a permanent character, and execute military manœuvres on any authorised land; (*b*) supply themselves with water, but not so as to interfere with any industry or deprive any private owner of a water supply, or public authority of the supply shown to be required by those entitled to use such water supply. Provided as follows: "(1) Nothing in this Act shall authorise entry on or interference with (except to the extent of using authorised roads) any dwelling-place, place of worship, school, factory, workshop, store, or premises used for the carrying on of any trade, business, or manufacture, farmyard, garden, orchard, pleasure-ground, or nursery-ground, burial-ground, ground attached to any place of worship or school, or any premises enclosed within the curtilage of or attached to any dwelling-house. (2) The officer in command of the authorised forces shall take care that there is no interference with earthworks, ruins, or other remains of antiquarian or historical interest, or with any picturesque or valuable timber, or other natural features of exceptional interest or beauty, and shall be empowered to prevent trespass

[1] 60 & 61 Vict. c. 43. [2] 1 & 2 Geo. V. c. 44.
[3] 1897 Act, s. 1 (1); 1911 Act, s. 1 (1).

or damage to property by persons not belonging to the forces, and shall cause all lands used under the powers conferred by this Act to be restored as soon and as far as practicable to their previous condition." [1]

Two justices, not being military officers in command of the forces, on the application of a commissioned officer in command of the authorised forces or part thereof, may close for forty-eight hours any right-of-way, and close for any period not exceeding twelve hours any county, main, or parish road, under certain formalities and restrictions, and may authorise any general or field officer to make an order suspending for a time not exceeding six hours in any one day the use of any specified roads or footpaths.[2]

1296. A Military Manœuvres Commission may be appointed, consisting of two persons appointed by the council of each county, and one by the council of each burgh wholly or partly within the specified limits, together with such other persons, being resident owners or occupiers of land within the limits, as the Secretary of State may appoint, but such persons must be less in number than the county and burgh representatives. Three members form a quorum, and the chairman has a second or casting vote. The Commission may make certain orders and regulations, and lay down the procedure under which they are to be made and published.[3] Compensation is to be made out of money to be provided by Parliament, "for any damage done to person or property, or interference with rights or privileges, arising from putting in force any of the provisions of this Act, and whether or not occasioned by the acts or defaults of the authorised forces, including therein all expenses reasonably incurred in protecting persons, property, rights and privileges, and any damage, by reason of excessive weight or extraordinary traffic, to any highway for the repair of which any public body or any individual is responsible." [4] The Commission may appoint compensation officers with the concurrence of the Treasury, and make regulations for the determination and payment of claims; and "cases of compensation not settled by agreement shall be settled as questions of disputed compensation under subsec. (10), s. 25, of the Local Government (Scotland) Act, 1894." [5]

1297. It is provided: "(1) If within the limits and during the period specified in an order authorising military manœuvres under this Act any person (*a*) wilfully and unlawfully obstructs or interferes with the execution of the manœuvres, or (*b*) without due authority enters or remains in any camp, he shall be liable on summary conviction to a fine not exceeding forty shillings, and he and any animal or vehicle under his charge may be removed by any constable, or by order of any commissioned officer of the authorised forces. (2) If within the limits and during the period aforesaid any person (*a*) without due authority moves any flag or other mark distinguishing, for the purposes of the

[1] 1897 Act, s. 2.
[2] *Ibid.*, s. 3; 1911 Act, s. 3.
[3] 1897 Act, ss. 4 and 5.
[4] *Ibid.*, s. 6.
[5] 57 & 58 Vict. c. 58.

manœuvres, any lands, or (*b*) maliciously cuts or damages any telegraph wire laid down by or for the use of the authorised forces, or (*c*) erects or displays any notice or mark on or relating to any authorised land or authorised source of water representing or implying that the use of such land or source is not authorised, he shall be liable on summary conviction to a fine not exceeding five pounds." [1]

Section 17.—Powers to take Lands for Military Purposes.

1298. The Act of 1892,[2] as amended by the Acts of 1897,[3] 1900,[4] 1903,[5] and 1921,[6] gives power to the Secretary of State, to volunteer corps with his consent, and to county or town councils at the request of one or more volunteer corps, to purchase lands for military purposes The machinery for making the purchase is to be the Lands Clauses Acts with certain modifications.[7] Any expenses incurred by the council of a county or borough for the purposes of this Act are to be paid out of the county fund or borough fund or borough rate. Secs. 5, 6, 7 and 25, and s. 1 of the Act of 1897, give certain borrowing powers to volunteer corps and burgh councils. Sec. 25 (6) gives power to any person or body of persons or authority holding land for ecclesiastical or public purposes to lease such land to a Secretary of State or to a volunteer corps for military purposes for any term not exceeding twenty years, subject to certain provisions.

1299. Part II. of the Act gives power to a Secretary of State to make by-laws as to the use of lands held for military purposes, and for securing the safety of the public. No by-law made in pursuance of these powers may take away or prejudicially affect any right of common.[8] "A by-law made under this Act shall not interfere with any highway, unless made with the consent of the authority having the control of the repair of the roads of the town, district, or parish or other area in which the highway is situate ; but where it appears to the authority that any highway crosses or runs inconveniently or dangerously near to any land the use of which can be regulated by by-laws under this Act, the authority may consent to a by-law providing, to such extent as seems reasonable, for the temporary diversion from time to time of the highway, or for the restriction from time to time of the use thereof." [9] "Any such highway, if a footpath, may (without prejudice to any other form of stopping or diverting the same) be stopped up or diverted in the manner in which a footpath, crossing or running inconveniently or dangerously near to any land leased under Part I. of this Act, may be stopped up or diverted." [10]

1300. The proposed by-laws must first be made known in the locality, and objections, if any, received and considered ; and when any such

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[1] 1897 Act, s. 7 ; 1911 Act, s. 4.
[2] 55 & 56 Vict. c. 43.
[3] 60 & 61 Vict. c. 70.
[4] 63 & 64 Vict. c. 56.
[5] 3 Edw. VII. c. 47.
[6] 11 & 12 Geo. V. c. 37, s. 4 (1), and Schedule 2.
[7] 1892 Act, ss. 2 and 20.
[8] *Ibid.*, s. 14 (1).
[9] *Ibid.*, s. 16 (1).
[10] *Ibid.*, s. 16 (2).

by-laws are made, the area affected must be marked out, and the by-laws published in such manner as appears to the Secretary of State necessary to make them known to all persons in the locality.[1] Persons offending against any by-law under the Act are liable on summary conviction to a fine not exceeding £5, and may be removed by any constable or officer, authorised in manner provided by the by-law, from the area, whether land or water, to which the by-law applies, and taken into custody without warrant, and brought before any Court of summary jurisdiction, to be dealt with according to law ; and any vehicle, animal, vessel, or thing found in any area in contravention of any by-law may be removed by any constable or officer, and, on due proof of such contravention, be declared by a Court of summary jurisdiction to be forfeited to His Majesty.[2] In the case of leased lands the by-laws must not be inconsistent with anything contained in the lease, and the lessor may stipulate in the lease that his consent must be obtained before any by-law is made, or power may be granted to him under the lease to make by-laws himself, with the consent of the Secretary of State.

1301. Sec. 21 gives power to the Secretary of State to authorise any person to enter on any lands for the purpose of erecting, repairing, or replacing alignment works for the purposes of coast defence, and the owner of the land may claim compensation for any damage done. The expression " military purposes " includes rifle or artillery practice ; the building and enlarging of barracks and camps ; the erection of butts, targets, batteries, and other accommodation ; the storing of arms ; military drill ; and any other purpose connected with military matters approved by the Secretary of State.

1302. These Acts have been adapted and applied to the Territorial Force by the Territorial Force Regulations.[3] The County Association is now the authority for putting the powers conferred by the Acts in force and holding the land so acquired.

The Acts are extended to the Royal Naval Volunteer Reserve by the Naval Lands (Volunteers) Act, 1908 (8 Edw. VII. c. 25), and to the Royal Air Force [4] and to civil aviation.[5]

PART V.—THE AIR FORCE.

Section 18.—Constitution and Administration.

Subsection (1).—*Origin of Force.*

1303. The present organisation, which was formed by the amalgamation of the Royal Naval Air Force and the Royal Flying Corps, was brought into being by the Air Force (Constitution) Act, 1917.[6] This Act gives authority to raise and maintain a force, to be called the Air Force,

[1] 1892 Act, s. 17 (1). [2] 1892 Act, s. 17 (2).
[3] 7 Edw. VII. c. 9, s. 4 and S.R. & O., 1912 (No. 1814) p. 1211.
[4] S.R. & O., 1918 (No. 538), p. 66.
[5] 10 & 11 Geo. V. c. 80, s. 15. [6] 7 & 8 Geo. V. c. 51.

consisting of such number of officers, warrant officers, non-commissioned officers and men as may from time to time be authorised by Parliament.[1] The government, formations, discipline, pay, and allowances of the Air Force are to be regulated by orders of His Majesty signified under the hand of a Secretary of State.[2] His Majesty may by Order-in-Council apply, with the necessary modifications and adaptations, to the Air Force any enactment relating to the Army.[3]

Subsection (2).—*The Air Council.*

1304. The Air Force is administered by the Air Council, which consists of a principal Secretary of State who is the president of the Council; the Parliamentary Under-Secretary of State for Air who is the vice-president of the Council; the Chief of the Air Staff (the Senior Air Member) who is appointed by His Majesty; the Air Member for Personnel; the Air Member for Supply and Research; and the Secretary of the Air Ministry who is the secretary of the Council. Provision is made for the appointment of two additional members by the Secretary of State.[4]

The Air Council has powers to deal with all matters connected with civilian air navigation as well as with Air Force matters.[5] (See Air.) The Air Council has an Official Seal.[6] The Documentary Evidence Act, 1868,[7] as amended by the Documentary Evidence Act of 1882,[8] is to apply to the Air Council. Provision is also made in the Act to allow the Secretary of State and the Under-Secretary for Air to sit and vote in the House of Commons.[9] The Air Council may sue and be sued, and may for all purposes be described by that name.[10] "This section does not derogate from the principle that no action will lie on a contract made on behalf of the Crown by a servant of the Crown." The Court of Appeal declined to express any opinion whether this *dictum* was right or wrong.[11] The Air Council may appoint such secretaries, officers, and servants as it, with the sanction of the Treasury, may determine, and they are to be paid out of moneys provided by Parliament.[12] The Air Force is authorised annually by the Army and Air Force (Annual) Act in the same manner as the Army and Marine Forces. The Air Force comprises the Regular Air Force; the Auxiliary Air Force, and the Air Force Reserve.

Section 19.—The Regular Air Force.

Subsection (1).—*Constitution.*

1305. The Air Force (Constitution) Act, 1917,[13] authorises the adaptation of the Army Act to the Air Force, and this has been done by adapting

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[1] 7 & 8 Geo. V. c. 51, s. 1. [2] *Ibid.*, s. 2. [3] *Ibid.*, s. 13. [4] *Ibid.*, s. 8.
[5] Air Navigation Act, 1920 (10 & 11 Geo. V. c. 80).
[6] 7 & 8 Geo. V. c. 51, s. 10 (2). [7] 31 & 32 Vict. c. 37. [8] 45 & 46 Vict. c. 9.
[9] 7 & 8 Geo. V. c. 51, ss. 10 and 11. [10] *Ibid.*, s. 10 (1).
[11] *Rowland* v. *The Air Council*, 1923, 39 T.L.R. 228, 455.
[12] 7 & 8 Geo. V. c. 51, s. 9. [13] *Ibid.*, s. 12 (1).

it as set out in the second schedule to the Act. This Act, which is entitled "an Act to provide for the discipline and regulation of the Air Force," is printed at intervals and incorporates such alterations and amendments to the Army Act in force in 1917 as may be set forth in the Army and Air Force (Annual) Acts. All references to this Act, whose short title is the Air Force Act (A.F.A.), are to the Act revised to include all amendments made down to the date of the passing of the annual Act, 1925. This Act remains in force only so long as the Army Act continues in force.[1]

Subsection (2).—*Discipline.*

1306. Discipline is dealt with in Part I. of the Air Force Act and the Rules of Procedure made thereunder.[2] The provisions are similar to those in force for the Army, subject to such modifications and exceptions as may be necessary to adapt them to the Air Force.[3]

Subsection (3).—*Commissions and Enlistment.*

1307. Officers are awarded commissions either after passing through a course of cadet training at Cranwell or from the ranks. Officers in the Air Force enjoy the same powers, rights, immunities, and privileges as are enjoyed by commissioned officers of His Majesty's Navy or Army.[4] Any member of any of His Majesty's Naval or Military Forces may, with his consent and subject to the approval of the Admiralty or Air Council (as the case may be), be transferred by the Air Council to the Air Force or attached thereto for a period not exceeding four years.[5] The designations and ranks of commissioned officers of the Air Force are set out in the Army and Air Force (Annual) Act, 1920.[6] The Crown has powers to make regulations as to command and the exercise of that command.[7] Officers of the Naval and Military Forces who are attached to the Air Force are subject to the Air Force Act, subject to the qualification that officers of the naval forces attached to, lent to, or seconded for service with the Air Force are not subject to the Air Force Act where subject to naval discipline.[8] Officers of the Air Force during the time they are borne on the books of any of His Majesty's ships in commission are subject to naval discipline with certain exceptions.[9]

1308. Enlistment is dealt with in Part II. of the Air Force Act. Enlistment is for a period not exceeding twelve years. The regulations and provisions are similar to those of the Army Act[10] with the exception that an airman may be re-engaged for a total period not exceeding twenty-four years.[11]

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[1] 7 & 8 Geo. V. c. 51, s. 12 (2).
[2] Rules of Procedure, 1918, and A.F.A., s. 70.
[3] *Vide supra* under Military Forces.
[4] 7 & 8 Geo. V. c. 51, s. 4.
[5] *Ibid.*, s. 3 (1).
[6] 10 & 11 Geo. V. c. 7, s. 11 and Schedule 4.
[7] A.F.A., s. 71.
[8] *Ibid.*, s. 175, 1 (*a*), and 176 1 (*b*).
[9] *Ibid.*, s. 179.
[10] *Vide supra* under Military Forces.
[11] A.F.A., s. 84 (1).

SUBSECTION (4).—*Billeting and Impressment of Carriages.*

1309. These are dealt with in Part III. of the Air Force Act, and the provisions are similar to those of the Army Act with certain minor adjustments.[1]

SECTION 20.—THE AUXILIARY AIR FORCE.

SUBSECTION (1).—*Origin.*

1310. By the Air Force (Constitution) Act, 1917,[2] it is declared lawful for His Majesty to raise and maintain both an Auxiliary Air Force and an Air Force Reserve, consisting in each case of such number of officers, warrant officers, non-commissioned officers, and men as may from time to time be provided by Parliament, and by that Act as amended [3] it is provided that any enactments relating to the Army Reserve or the Territorial Army may be adapted by Order-in-Council to the Air Force Reserve or the Auxiliary Air Force. The Auxiliary Air Force was established by the Auxiliary Air Force and Air Force Reserve Act, 1924,[4] and the necessary adaptations of the Territorial and Reserve Forces Act, 1907,[5] were issued as the Auxiliary Air Force Order, 1924.[6]

SUBSECTION (2).—*Constitution.*

1311. The Auxiliary Air Force is organised on the same plan as the Territorial Army, and is a voluntary force available for Air Service within Great Britain and Northern Ireland in defence of the British Islands against actual or apprehended attack. A flight is considered to be within Great Britain and Northern Ireland if the point of departure and the destination are both within Great Britain or Northern Ireland.[7]

SUBSECTION (3).—*County Joint Associations and Auxiliary Air Force Associations.*

1312. Provision is made for the establishment of (*a*) County Joint Associations, which, as respects the county, exercise the powers and perform the duties of an association in relation both to the Territorial Army and the Auxiliary Air Force, and (*b*) for the establishment, in areas which, in the opinion of the Air Council, cannot suitably be administered through County Joint Associations, or Auxiliary Air Force Associations.

1313. County Joint Associations are constituted and the members thereof appointed in accordance with schemes to be drawn up by the Army Council and Air Council jointly,[8] and the association is required

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[1] *Vide supra* under Military Forces.
[2] 7 & 8 Geo. V. c. 51, s. 6.
[3] 11 & 12 Geo. V. c. 37, s. 1.
[4] 14 & 15 Geo. V. c. 15.
[5] 7 Edw. VII. c. 9.
[6] S.R. & O., 1924 (No. 1212), Schedule.
[7] Auxiliary Air Force Order, 1924, Schedule Part II., 13 (1).
[8] *Ibid.*, Schedule Part I. A, 1*a*, and 2*a*.

to conform to the plans of organisation of the Army Council and the Air Council and to ascertain the military and auxiliary air force resources and capabilities of the county, but without any powers of command or training over any part of the military or air forces. Such sums of money as are required to meet the necessary expenditure are to be paid by the Army Council and the Air Council.[1]

The manner in which money is to be borrowed, land acquired, or property administered is a matter for the joint arrangement of the Army Council and the Air Council.[2] Provision is also made to allow of the application of cadet corps and rifle and aviation clubs to the Territorial Army and the Auxiliary Air Force.[3] A County Joint Association may join with any other County Joint Association, Territorial Army Association, or Auxiliary Air Force Association in appointing a joint committee for any purpose in which they are jointly interested.[4]

1314. The powers and duties of a County Joint Association include the organisation of the units of the Territorial Army and the Auxiliary Air Force, and their administration at all times other than those when they are called out for training or service or are embodied; recruiting for these forces in peace and in war; the provision and maintenance of rifle ranges, buildings, magazines, sites of camps, landing-grounds, aerodromes and hangars; establishing or assisting cadet battalions, corps and units and rifle and aviation clubs; the provision of horses and mechanical and other transport for peace requirements; and the payment of separation and other allowances to the families of men of the Territorial Army and the Auxiliary Air Force when embodied, called out, or on actual military or air force service.[5]

1315. Auxiliary Air Force Associations are given powers and have duties similar to those of the County Joint Associations, but dealing only with the Auxiliary Air Force; and all schemes and regulations are made by the Air Council.[6]

Subsection (4).—*Enlistment and Conditions of Service.*

1316. The government, discipline, and pay of the Auxiliary Air Force, rules for enlistment and discharge and conditions of service are dealt with in Part II. of the schedule to the Auxiliary Air Force Order, 1924.[7] First appointments to the lowest rank of officers of the Auxiliary Air Force are given to suitable persons on the recommendation of the president of the Auxiliary Air Force or County Joint Association of the district. Enlistment is for a period not exceeding four years, and a man is enlisted for the county or area in which he joins, and may select within that area the unit to which he wishes to be posted.[8]

Any airman may be discharged by his commanding officer for dis-

[1] Auxiliary Air Force Order, 1924, Schedule Part I. A, 3*a* (1).
[2] Order *cit.*, Schedule 1, 4*a* (1).
[3] *Ibid.*, 4*a* (1) (*f*).
[4] *Ibid.*, 5*a*.
[5] Order *cit.*, Schedule Part I. 2*a*.
[6] *Ibid.* (1).
[7] S.R. & O., 1924, No. 1212.
[8] Order *cit.*, Schedule Part II., s. 8.

obedience to orders, neglect of duty, misconduct, or other sufficient cause, the existence and sufficiency of which are to be judged by his commanding officer; but an appeal lies to the Air Council.[1] Although members of the Auxiliary Air Force are only liable to serve within Great Britain and Northern Ireland, they are liable to be called out to serve in case of actual or apprehended attack against the British Islands and they may volunteer for service outside these limits.[2]

Subsection (5).—*Training.*

1317. Training is divided into two parts: (*a*) preliminary training during the first year of original enlistment; and (*b*) annual training, (1) of not less than eight and not more than fifteen days in each year at any place prescribed, and (2) of attendance at such drills and parades as may be required. By Order-in-Council the period of annual training may be extended to thirty days.[3]

Subsection (6).—*Embodiment.*

1318. The Auxiliary Air Force is embodied or called out on actual service by the Air Council upon receipt of Orders from His Majesty, following upon a proclamation ordering the Air Force Reserve to be called out on permanent service. The Air Council are required to give the necessary directions within one month of the issue of the proclamation, unless within that time an address has been presented to His Majesty by both Houses of Parliament praying that such directions be not issued.[4] The Auxiliary Air Force may be disembodied by proclamation or by direction of the Air Council.[5] Other provisions are similar to those applicable to the Territorial Army.[6]

Section 21.—The Air Force Reserve.

Subsection (1).—*Origin.*

1319. The Air Force Reserve was established under powers contained in s. 6 of the Air Force (Constitution) Act, 1917.[7] By Order in Council following thereon (Air Force Reserve (Application of Enactments), No. 1 Order, 1918),[8] the provisions of the Reserve Forces Act, 1882 [9] and the relative parts of the Territorial and Reserve Forces Act, 1907,[10] Part III., were extended, subject to the modifications and adaptations set out in the schedule, to apply to the Air Force Reserve. By s. 3 of the Auxiliary Air Force and Air Force Reserve Act, 1924,[11] it was enacted that the power granted under s. 6 of the 1917 Act [7] should be extended to include

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[1] Order *cit.*, Schedule Part II., s. 9.
[2] *Ibid.*, s. 13 (1), (2).
[3] *Ibid.*, s. 14.
[4] *Ibid.*, s. 17.
[5] *Ibid.*, s. 18.
[6] *Vide supra* under Military Forces.
[7] 7 & 8 Geo. V. c. 51.
[8] S.R. & O., 1918 (No. 1064) i. 75.
[9] 45 & 46 Vict. c. 48.
[10] 7 Edw. VII. c. 9.
[11] 14 & 15 Geo. V. c. 15.

powers to apply, by Order-in-Council, any of those enactments to the Air Force Reserve, or to the officers or men thereof, with such modifications as might be necessary. These further modifications to the two Acts were set out in the First Schedule to the Air Force Reserve Order, 1924.[1]

Subsection (2).—*Constitution.*

1320. The Air Force Reserve is divided into two classes. (*a*) Men who having served in His Majesty's Regular Air Force may be transferred to the Reserve in pursuance of the Air Force Act, and (*b*) men who, whether they have so served or not, may be enlisted or re-engaged in pursuance of that Act.[2] All men in the Air Force Reserve who joined after 25th July 1924 are liable to be called out and to serve within Great Britain and Northern Ireland in defence of the British Islands against actual or apprehended attack. Any man of the Regular Air Force who enlisted prior to 25th July 1924 and was transferred after that date to the Air Force Reserve, and any man who was in the Air Force Reserve at that date, may agree in writing to accept liability for such service. Men so called out are deemed to be on permanent service and are subject to the Air Force Act.

1321. The whole or any portion of the Air Force Reserve may be called out in aid of the civil power in preserving the public peace, on an order from a Secretary of State.[3] It is also lawful for any officer commanding His Majesty's Regular Air Force in any town or district, on the requisition in writing of any justice of the peace, to call out the whole or part of such men of the reserve as are resident in that town or district.[4] These powers apply to Northern Ireland but not to the Irish Free State. They are exercisable by the Governor of Northern Ireland.

Subsection (3).—*Discipline and Conditions of Service.*

1322. Men of the Air Force Reserve guilty of an offence may be tried by court-martial or by a Court of Summary Jurisdiction.[5] Annual training is not, in any one year, to exceed twelve days or twenty drills or instructional parades, and for purposes of training, men of the Air Force Reserve are attached to and trained with a body of the Regular Air Force or of the Auxiliary Air Force.[6]

1323. The Air Force Reserve is called out on permanent service, in case of imminent national danger or of great emergency, by Proclamation of His Majesty in Council. The occasion is to be first communicated to Parliament, if sitting, or otherwise declared in Council, and later communicated to Parliament. Once called out on permanent service, men are liable to serve for so long as is necessary, but are not required to serve

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[1] S.R. & O., 1924, No. 1213.
[2] *Ibid.*, Schedule 1, s. 4*a*.
[3] Order *cit.*, Schedule 1, s. 5 (1).
[4] S.R. & O., 1924, No. 1213, Schedule 1, s. 5 (1), (2).
[5] *Ibid.*, s. 6 (2).
[6] *Ibid.*, s. 11.

for any period exceeding the unexpired remainder of their time of service in the reserve and a further period not exceeding twelve months. Reservists called out on permanent service form part of the regular Air Force, are subject to the Air Force Act, and are liable to serve in any part of the world.[1]

1324. Men may be enlisted in the Air Force Reserve as Special Reservists under the provisions of the Second Schedule of the Air Force Reserve Order 1924.[2] These provisions are similar to those of the Territorial and Reserve Forces Act, 1907.[3] All men who enlist in the Air Force Reserve as Special Reservists on and after 25th July 1924 undertake an obligation to serve within the limits of the British Islands in defence thereof, and are liable to be called out against actual or apprehended attack. Any man enlisted before that date may agree in writing to accept that obligation.[4]

Any man may agree to serve in any part of the world, and a number not exceeding 4000 may further agree in writing to be called out without proclamation or communication to Parliament. This power can only be exercised when the men are required for service outside Great Britain or Northern Ireland.[5] Men who have not previously served in the regular Air Force may enlist in the Special Reserve. The remaining provisions are similar to those applicable to the Militia.[6]

PART VI.—MISCELLANEOUS.

Section 22.—Regimental Debts Act, 1893.

1325. This Act,[7] provides that on the death of any person subject to military law, the prescribed Committee of Adjustment shall secure the effects of the deceased and pay preferential charges (s. 1), which are—

"(1) Expenses of last illness and funeral;

"(2) Military debts, namely, sums due in respect of (*a*) quarters; (*b*) mess, band, and other regimental accounts; (*c*) military clothing, appointments, and equipments, not exceeding a sum equal to six months' pay of the deceased, and having become due within eighteen months before his death"; to which shall be added, when the death occurs out of the United Kingdom,

(3) Servants' wages, not exceeding two months' wages to each servant; and

(4) Household expenses incurred within a month before the death, or after the last issue of pay to the deceased, whichever is the shorter period (s. 2).

Secs. 7, 8, and 9 provide for the distribution of the surplus among the deceased's representatives, and s. 10 for the application of the residue, when undisposed of after due publication during six years. Medals

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[1] S.R. & O., 1924, No. 1213, Schedule 1, s. 14. [2] *Ibid.*, Schedule 2, s. 30.
[3] 7 Edw. VII. c. 9. [4] S.R. & O., 1924, No. 1213, Schedule 2, ss. 32*a* (1) and 32*a* (2).
[5] *Ibid.*, s. 30 (2). [6] *Vide supra* under "Military Forces." [7] 56 Vict. c. 5.

and decorations are not comprised in the personal estate of the deceased with reference to the claims of creditors, or for any of the purposes of administration under this Act or any other Act, but are to be disposed of according to regulations laid down by Royal Warrant (s. 11). The Act applies to India under certain modifications (s. 25).

This Act has been extended in part to the Air Force by Order-in-Council.[1]

Section 23.—The Armed Forces in Ireland.

Subsection (1).—*Northern Ireland.*

1326. The control of and all powers in connection with armed forces in Northern Ireland are vested in the Crown and in the British Parliament. All provisions, rules, orders, and enactments which deal with the armed forces of Great Britain are construed to include Northern Ireland, unless it is expressly stated otherwise.

Subsection (2).—*The Irish Free State.*

1327. Oireachas (Legislature) (His Majesty the King, the Senate and the Chamber of Deputies) has the exclusive right of raising, maintaining, and controlling the armed forces which it is empowered by the Treaty to raise and maintain. Every such force is subject to the control of Oireachas, and its consent is necessary before the State can be committed to active participation in any war, except in a case of actual invasion.[2] Sec. 8 of the Second Schedule states that if a military defence force be established it is not to exceed such proportion of the military establishment of Great Britain as the population of the Irish Free State bears to the population of Great Britain. The Naval Defence of the Irish Free State is meantime to be undertaken by His Majesty's Imperial Naval Forces. The Irish Free State is to afford certain harbour facilities.[3]

Section 24.—Institutes.

1328. The Navy, Army, and Air Force Institutes, is an organisation incorporated as from 1st January 1922 to carry on the work of the Expeditionary Force Canteens and the Navy and Army Canteen Board, both of which were abolished. This institution now conducts canteens, institutes, and similar organisations for the benefit of the forces. The assets and liabilities of the old organisations were transferred to the new body, with the exception of a sum of some three million eight hundred pounds which, as representing a surplus, was distributed among (1) the Dominions and India, and (2) the United Services Fund.[4]

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[1] S.R. & O., 1918 (No. 548) i. 50.

[2] Irish Free State Constitution Act, 1922, sess. 2 (13 Geo. V. c. 1), First Schedule, Article 46.

[3] 12 & 13 Geo. V. c. 1; Second Schedule, ss. 6 and 7 and annex.

[4] War Service Canteens (Disposal of Surplus) Act, 1922 (12 & 13 Geo. V. c. 53).

ARRANGEMENT, DEED OF.

See SEQUESTRATION.

ARREARS.

See HERITABLE AND MOVEABLE.
INTEREST OF MONEY.

ARREST

OF CRIMINAL. *See* CRIME.
ON CIVIL DILIGENCE. *See* IMPRISONMENT FOR DEBT.

ARRESTMENT.

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Section 1.—Nature of Arrestment.

1329. The diligence of arrestment is defined by Erskine as the "command of a judge, by which he who is debtor in a moveable obligation to the arrester's debtor, is prohibited to make payment of his debt or perform his obligation, till the debt due to the arrester who uses the diligence be paid or secured." [1] There are three parties to an arrestment, viz. the arrester who lays on the arrestment, the arrestee in whose hands the arrestment is used, and the common debtor, likewise called the principal debtor, who is debtor to the arrester and creditor of the arrestee.

1330. The diligence is of two kinds, according to the grounds on which it proceeds—

1. *Arrestment in execution,* when the arrester holds a decree of Court or a decree of registration, in which case the arrested funds remain under arrestment, aye and until the arrester is completely satisfied and paid. There may likewise be arrestment in execution upon a liquid document of debt, in which case the arrested funds remain under arrestment until sufficient caution be found that the debt be made forthcoming in terms of law.[2]

2. *Arrestment in security* of funds to meet a debt not yet due or for which the arrester has raised an action. It is not as a rule competent in respect of a future or contingent debt unless on special grounds, *e.g.* that the common debtor is *in meditatione fugæ* or *vergens ad inopiam.*

General Authorities.—Graham Stewart, Law of Diligence, p. 13 *et seq.*; Scots Style Book, i. 390 *et seq.*

[1] Ersk. ii. 6, 2.

[2] Bell, Prin. 2274.

Arrestment is only inchoate diligence. To complete the transfer and make the arrester's right real, a decree of furthcoming must be obtained.

Section 2.—Warrant to Arrest.

1331. Arrestment proceeds on the authority either of the Court of Session or of an inferior judge.

It may proceed in the Court of Session:—

1. On a warrant contained in letters of horning. A charge need not be given on these letters in order to render arrestment competent.[1]

2. On special letters, which may be obtained from the Court by bill, the creditor exhibiting his ground of debt, which must be liquid, though it need not be registered. When a foreigner procures these letters, they must bear the concurrence of a mandatary.[2]

3. By arrestment on the dependence. By s. 16 of the Personal Diligence Act, 1838,[3] warrants to arrest may be inserted in the will of summonses before the Court of Session.

In the Sheriff Court a certified copy of the initial writ is a sufficient warrant to arrest, where it is competent to arrest on the dependence. Separate precepts of arrestment may be issued by the Sheriff-Clerk, upon production to him of a writ containing pecuniary conclusions upon which a warrant of citation has been granted, or of a liquid document of debt (Sheriff Courts Act, 1907–1913, rule 46.)

4. By the Personal Diligence Act of 1838, warrants of arrestment may be inserted in extracts of decrees of both the Supreme and the Sheriff Courts.

Section 3.—Arrestment on the Dependence—when Competent.

1332. Arrestment on the dependence is competent even after the case has been appealed to the House of Lords.[4] When the defender is resident abroad he must be subjected to the jurisdiction of our Courts, and a separate arrestment *ad jurisdictionem fundandam*[5] may be required to render arrestment on the dependence competent.[6]

1333. Arrestment on the dependence is competent before executing the warrant of citation, provided the latter shall be executed against the defender within twenty days after the date of the execution of the arrestment, and the summons be called in Court within twenty days after the diet of compearance; or, when the expiry of twenty days after the diet of compearance falls within Vacation, or previous to the first calling day in the session next ensuing, provided the summons be called on the first calling day next thereafter; and if the warrant of citation shall not be executed, and the summons called as stated, the arrestment shall be null, without prejudice to the validity of any subse-

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[1] *Weir* v. *Falconer*, Feb. 2, 1814, F.C.
[2] *Johnston* v. *Jeudwine*, Jan. 23, 1813, F.C.
[3] 1 & 2 Vict. c. 114.
[4] *Johnston* v. *Jeudwine*, *supra*.
[5] See below, s. 17.
[6] *Bertrams* v. *Barry & Bruce*, March 6, 1821, F.C.

quent arrestments.[1] This enactment was in effect extended to the Sheriff Court by Act of Sederunt, 1839, s. 154. Now by the Sheriff Court Acts, 1907–1913,[2] an arrestment on the dependence of an action in the Sheriff Court used prior to service shall fall unless the action shall have been served within twenty days from the date of execution of the arrestment, and in the case of defended actions tabled within twenty days of the first ordinary court day occurring subsequent to the expiry of the induciæ, and in the case of undefended actions decree in absence be taken within twenty days of the expiry of the induciæ ; and when such an arrestment has been executed the party using it or his agent shall forthwith report the execution to the Sheriff Clerk.

1334. Arrestment on the dependence is incompetent if the summons contain no pecuniary conclusions, as in purely declaratory, consistorial or rescissory actions. The summons must conclude for money presently due, not for a debt future or contingent, unless a special ground is alleged —*e.g.* that the debtor is *vergens ad inopiam* or *in meditatione fugæ*, or is putting away his funds to defeat his creditors' claims. It is thus competent in actions for adherence and aliment, and separation and aliment, but the special ground requires to be averred.[3] It was held incompetent when used on the dependence of a summons of divorce which contained conclusions for accounting to the pursuer for his or her legal rights as the injured spouse.[4] The arrestment covers expenses of process and interest on the principal sum sued for ;[5] but not the expenses of the arrestment itself.[6]

Section 4.—Letters of Arrestment.

1335. Application by bill for letters of arrestment must be made[7] (1) where no warrant to arrest has been inserted in the summons ; and (2) though a warrant has been inserted, where arrestment has not been used before citation, or where there has been no citation within twenty days from the date of execution of the arrestment, or where the summons has not been called within twenty days of the diet of compearance or the first calling day in the session next ensuing ; when the expiry of the last-mentioned twenty days falls in Vacation, the Personal Diligence Act, 1838, provides that the arrestment shall be null, without prejudice to the validity of any subsequent arrestment duly executed in virtue of said warrant. Perhaps, under the saving clause at the end of this section, it might still be competent to arrest on the dependence of a summons containing a warrant ; but as this has not been decided, it would be safer in these cases also to proceed by bill and letters.[8]

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[1] 1 & 2 Vict. c. 114, s. 17.

[2] 7 Edw. VII. c. 51, as amended by 2 & 3 Geo. V. c. 28, rule 127.

[3] *Symington* v. *Symington*, 1875, 3 R. 205 ; *Burns* v. *Burns*, 1879, 7 R. 355 ; *James* v. *James*, 1886, 13 R. 1153 ; *Millar* v. *Millar*, 1907 (O.H.), 15 S.L.T. 205.

[4] *Ellison* v. *Ellison*, 1901, 4 F. 257 ; *Stuart* v. *Stuart*, 1926, S.L.T. 31.

[5] *May* v. *Malcolm*, 1825, 4 S. 76 ; *M'Donald & Halket* v. *Wingate*, 1825, 3 S. 344.

[6] *Symington, ut supra.* [7] 1 & 2 Vict. c. 114, s. 17. [8] Mackay, Manual, 9.

(3) Letters are also required for arrestment in security upon a liquid document of debt before the term of payment, on the ground that the debtor is *vergens ad inopiam*.

Section 5.—Execution of Arrestments.

1336. The warrant to arrest is executed by leaving in the arrestee's hands, if within Scotland, a schedule or short copy, and returning an execution, either indorsed on the warrant or separately, bearing that the arrestment was duly executed. If the arrestee is furth of Scotland, the arrestment is executed by delivery of a schedule at the office of Edictal Citations at Edinburgh ;[1] but in such case the arrestment shall not be held to have interpelled such person from paying to the common debtor, unless proof be made that he, or those having authority to act for him, were previously in the knowledge of the arrestment having been so used.[2] But justifiable ignorance on the part of the arrestee may excuse him even if he be in Scotland. Thus the arrestee, before the arrestment, remitted to his agent a sum to pay a debt due at the place where the agent resided, and thereafter left home. An arrestment was used at his dwelling-house. The agent thereafter paid the debt, and it was held that the arrestee, who was ignorant of the arrestment till too late to stop the payment, was not bound to pay to the arrester.[3] An arrestment executed neither personally against the arrestee nor at his dwelling-house, but only at the counting-house of a company of which he was a partner, was held inept.[4] Under the Sheriff Court Act, 1907,[5] an arrestment shall be ineffectual if the schedule of arrestment shall not have been personally served on the arrestee, unless a copy of such schedule shall also be sent to the arrestee at his last known place of abode by postal registered letter ; or, if such place of abode is unknown, or if the arrestee is a firm or corporation, to the arrestee's principal place of business, or, if not known, to any known place of business of the arrestee. The officer must certify in his execution that he has done so, stating the address to which the copy has been sent.

1337. The execution is null unless the messenger and the witness sign it, and are named and described in it.[6] The copy delivered to the arrestee must be signed by the messenger, and bear the date of the execution and the name and description of the witness.[7] But the Statute of 1693, while prescribing these requisites, does not contain any express declaration of nullity. Arrestment being a diligence, the omission of anything essential in the execution, the incorrect description of the debt, or the omission of the requisites of the Act of 1681, will be fatal.[8] The necessity for care in framing the Schedule of Arrestment

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[1] 1 & 2 Vict. c. 114, s. 18. [2] *Leslie* v. *Ashburton*, 1827, 6 S. 165; 19 & 20 Vict. c. 91, s. 1.
[3] *Laidlaw* v. *Smith*, 1838, 16 S. 367, affd. 2 Rob. App. 490.
[4] *Sharp, Fairlie & Co.* v. *Garden*, 1822, 1 S. 314; N.E. 337.
[5] 7 Edw. VII. c. 51, rule 126.
[6] 1681, c. 5. [7] 1693, c. 12. [8] Bell, Prin. s. 2277.

is shewn by a case,[1] where a furthcoming failed because the schedule bore to arrest funds in the hands of the law agent of an executry estate due and addebted to *A.*, instead of to *A.* as executor, the arrester's decree being against *A.* as executor. An erroneous execution may be replaced by a correct one before being produced in judgment.[2] An arrestment in the hands of a corporation is well executed by the delivery of the schedule of arrestment to a servant of the corporation at its proper place of business—in the case of a city corporation, at the city chambers.[3] But where an Act of Parliament provided that certain commissioners should be a body corporate, "and shall have power to sue and be sued in that name alone," arrestments used in the hands of the clerk to the commissioners were held invalid.[4]

1338. Warrant to arrest a ship was granted on summary petition to the Inner House in special circumstances, the circumstances being that a bottomry bond had been granted over a vessel by the master, that the bond was not paid, and that the holder was proceeding to raise action upon it against the master. The vessel had put into Leith, and the bondholder, being unable in the circumstances to arrest it on the dependence, and being apprehensive that it might be removed beyond the jurisdiction, presented the petition.[5]

Section 6.—Subjects Arrestable.

1339. All moveable goods belonging to the common debtor in the possession of third parties may be arrested. Household furniture, however, in the occupation of a third party as tenant of a furnished house rented from the common debtor, has been treated as an exception to this general rule. All moveable debts due to the common debtor, whether pure or conditional, are also arrestable, as also are the following:—Arrears of rent or interest; claims in respect of moveable subjects, though their validity or extent may depend on the issue of a suit, seeing they are transmissible by voluntary assignation; ships, by an ordinary warrant of arrestment.[6] But the arrestment of a ship on the dependence is not a proper method for working out a maritime lien upon the ship. This point and the difference between the arrestment of a ship and an ordinary arrestment are discussed in a recent case.[7] The arrestment is made by fixing the copy to the mainmast if the ship is masted, and chalking above it the royal initials. If it is not masted, the copy is fixed to the stern. The arrestment was held good though the debtor's name did not appear on the register.[8] Arrestment used by the private creditor of the part-owner of a ship authorises detention of the ship till

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[1] *Gibb* v. *Lee*, 1908, 16 S.L.T. 266.
[2] *May* v. *Malcolm*, 1825, 4 S. 79; N.E. 76.
[3] *Campbell* v. *Watson's Tr.*, 1898, 25 R. 690.
[4] *Gall* v. *Stirling Waterworks Comrs.*, 1901 (O.H.), 9 S.L.T. 123.
[5] *Lucovich*, 1885, 12 R. 1090.
[6] *Clark* v. *Loos*, 1853, 15 D. 750.
[7] *Clan Line Steamers, Ltd.* v. *E. of Douglas Steamship Co., Ltd.*, 1913, S.C. 967.
[8] *Bell* v. *Gow*, 1862, 1 M. 183.

security is granted to the extent of the debtor's interest.[1] Shares of ships,[2] and shares in companies,[3] are arrestable. A beneficiary's interest in a trust estate, if moveable, may be arrested in the hands of the trustees, though the estate itself consists of land or other heritable property, and is not turned into money.[4] Arrestment of a trust fund must be made in the hands of a quorum of trustees.[5]

1340. All bonds on which seisin has not been taken, and which have therefore not been made properly heritable, are arrestable. This was so held for lessening the expense of diligence to creditors ; but the rule applies only to contracts and obligations, and does not cover adjudications, wadsets, or other personal rights to land which are not debts proper.[6] Where the bond is moveable, or when it is heritable, but is incomplete through no seisin having been taken, an arrestment will carry the whole capital sum, the past interest, and all future interest until payment. But where the bond is heritable, perfected by seisin, the capital sum is not touched by the arrestment, which only secures the interest which is already due, or which has become current at the time of the laying-on of the arrestment. A bond due to a wife was held not attached by an arrestment, which was held to have secured only the past and current interest.[7] The price of heritable subjects vested in trustees for behoof of creditors,[8] or for behoof of legatees,[9] may be arrested.

1341. Alimentary provisions, including salaries, wages, and pensions, may be arrested for alimentary debt. The order of preference is, first, for current alimentary debts, and, secondly, for arrears of alimentary debts ; so that the current income of an alimentary fund may be arrested by one who is a creditor for arrears of alimentary debt.[10] An alimentary fund is subject to diligence to the extent to which it is not required for the reasonable maintenance of the person entitled thereto. Accordingly, arrears may be arrested by ordinary creditors except in so far as required to meet alimentary debts.[11] But it was held that nothing was subject to arrestment in a case where trustees were holders of an alimentary fund, and having paid a reasonable aliment, were retaining the balance of income to pay off a debt due to them by the alimentary creditor.[12]

1342. Ministers' stipends ;[13] the salary of a professor,[14] of an extractor of the Court of Session,[15] of the rector of an academy,[16] of a pursuivant-

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[1] *M'Aulay* v. *Gault*, March 6, 1821, F.C. [2] *Lucovich*, *ut supra*.
[3] *Borjesson* v. *Carlberg*, 1878, 5 R. (H.L.) 215.
[4] *Learmont* v. *Shearer*, 1866, 4 M. 540. [5] *Black* v. *Scott*, 1830, 8 S. 367.
[6] 1644, c. 41, revived 1661, c. 51 ; *Stewart* v. *Dundas Crs.*, 1796, Mor. 705 ; *Lockhart* v. *Lord Bargany*, 1666, Mor. 701.
[7] *Clunies' Crs.* v. *Sinclair*, 1739, Mor. 713. [8] *Grierson* v. *Ramsay*, 1780, Mor. 759.
[9] *Douglas* v. *Mason*, 1796, Mor. 16213. [10] *Ruthven* v. *Pulford & Sons*, 1909, S.C. 951.
[11] Stair, iii. 1, 37 ; Ersk. iii. 6, 7 ; Bell, Com. i. 126 ; *Livingstone* v. *Livingstone*, 1886, 14 R. 43 ; *Donald* v. *Donald*, 1860, 22 D. 1118 ; *Muirhead* v. *Miller*, 1877, 4 R. 1139.
[12] *Kidstons & Co.* v. *M'Farlane's Trs.*, 1904 (O.H.), 12 S.L.T. 722.
[13] *Hale* v. *His Crs.*, 1736, Mor. 711 ; *Learmonth* v. *Paterson*, 1858, 20 D. 418.
[14] *Laidlaw* v. *Wylde*, 1801, Mor. Arrestment, App. No. 4.
[15] *Miller* v. *Wilson*, 1827, 5 S. 926. [16] *Murray* v. *Bell*, 1833, 11 S. 599.

at-arms,[1] of a clerk in municipal offices ;[2] macers' fees ;[3] the dues payable to the principal keepers of the Parliament House[4] are arrestable ; the Court, however, will consider the circumstances of the common debtor, and, while sustaining the arrestment, may do so under reservation of a reasonable aliment. A claim of damages for wrongous dismissal has been held arrestable, although at the date of the arrestment no claim, judicial or extrajudicial, had been made by the dismissed servant against his employers.[5] Army and navy pay and salaries and pensions of civil servants are the subject of special statutory regulation.[6] Arrears due to officers in the army are arrestable,[7] but not half-pay, although the latter is attachable by a trustee in bankruptcy.[6] Conditional debts are arrestable, for the condition after it is purified acts *retro* to the date of the ground of debt.[8] The contents of a policy of insurance may be arrested during the life of the party insured. If he dies before another premium falls due, the arrestment is effectual ; but it is not settled what is the effect of the arrestment after another premium has fallen due.[9] The rule that the arrestee must have possession of the subject arrested when the arrestment is laid on suffers exception in the case of an insurance broker, premiums being arrestable by the insurer's creditors in the hands of the broker, though he has not, in fact, received them.[10]

1343. Rents and interest are arrestable so far as current only, because what falls due afterwards is accounted future debt ; but an arrestment used between Martinmas and Whitsunday in the hands of a tenant affects not only the past-due rent, but that which does not become payable till Whitsunday, for its term is current, because it has begun to run as from Martinmas, and therefore it is accounted a present debt.[11] This principle applies in regard to all termly payments, however short.[12] But arrestment on the term day will not affect the half-year's rent then ensuing, that day being considered as the last day of the preceding term.[13] Where the conventional term of payment is postponed beyond the legal term, the arrestment of rents is regulated by the latter.[14] When annuities due to widows are arrestable, there is no current term, because whether any annuity shall fall due to her at the next term after the arrestment depends on her surviving that term. But the arrestment was sustained where the widow actually survived the next term.[15]

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[1] *Moinet* v. *Hamilton*, 1833, 11 S. 348. [2] *M'Intyre* v. *Mackenzie*, 1833, 11 S. 658.
[3] *Cunningham* v. *His Crs.*, 1681, 3 Bro. Supp. 393. [4] *Holiday* v. *M'Kaile*, 1773, Mor. 729.
[5] *Riley* v. *Ellis*, 1910 S.C. 934 ; *cf.*, however, *Mather & Son* v. *Wilson & Co., Ltd.*, 1908 (O.H.), 15 S.L.T. 946.
[6] 47 Geo. III. c. 25, s. 4 ; Bankruptcy (Scotland) Act, 1913 (3 & 4 Geo. V. c. 20), s. 148.
[7] *Brodie* v. *Campbell*, 1715, Mor. 709.
[8] Ersk. iii. 6, 8 ; *Marshall* v. *Nimmo & Co.*, 1847, 10 D. 328.
[9] *Strachan* v. *M'Dougle*, 1835, 13 S. 954 ; *Bankhardt's Trs.* v. *Scottish Amicable Life Assurance Society*, 1871, 9 M. 443.
[10] *Pitcairn & Scott* v. *Adair*, Feb. 7, 1809, F.C.
[11] *Livingstone* v. *Kinloch*, 1795, Mor. 769. [12] *Smith & Kinnear* v. *Burns*, 1847, 9 D. 1344.
[13] *Wright* v. *Cunningham*, 1802, Mor. 15919 ; *Pindar* v. *Davidson*, 1824, 3 S. 69.
[14] *Handyside* v. *Corbyn & Lee*, Jan. 15, 1813, F.C. [15] *Corse* v. *Masterton*, 1705, Mor. 767.

1344. All debts in which the debtor is personally bound are arrestable. But arrestment cannot attach debts whereof the term of payment has not yet come, "for it is presumable that the debtor has got the term of payment postponed, from a view that he may in the intermediate time have a free administration of his whole estate, and thereby raise a fund sufficient for the payment of his debts." [1] But if the debtor be *vergens ad inopiam*, arrestment for security may be used on a future debt.[2] It may also proceed when the debtor is *in meditatione fugæ*, or when there are other special circumstances calling for the exercise of the Court's discretion.[3] Future or contingent annuities may be arrested.[4]

Section 7.—Subjects not Arrestable.

1345. Bills and promissory notes, which pass from hand to hand like money, are not arrestable.[5] Sums destined by the granter for a special purpose cannot by arrestment be diverted, contrary to the granter's intention, to any other use.[6] Upon this ground, alimentary rights for the personal subsistence of the grantee thereof are not arrestable.[7] But the person who has furnished the alimony may arrest the past-due interest; and the fund, in so far as it is in excess of a fair aliment, is available to other creditors.[8] Annuities to ministers' widows under the Statutes establishing the Widows' Fund [9] cannot be assigned before the term of payment; [10] but annuities under the Schoolmasters' Widows' Fund are arrestable.[11]

1346. At common law servants' wages are not arrestable except such portion as may not be required for their reasonable subsistence. By statute,[12] wages of labourers and manufacturers shall so far as necessary for their subsistence be deemed alimentary and, in like manner as servants' fees and other alimentary funds, are not liable to arrestment. All arrestments of wages on the dependence of small debt summonses are illegal.[13] Wages of all labourers, farm servants, manufacturers, artificers and workpeople were formerly free from any arrestment except in so far as they exceeded twenty shillings a week.[14] The amount thus free from arrestment has now been raised to thirty-five shillings.[15] But these Acts in no way affect arrestments in virtue of decrees for alimentary allowances, or for rates and taxes imposed by law, and every arrestment

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[1] Ersk. iii. 6, 10.
[2] *L. Pitmedden* v. *Patersons*, 1678, Mor. 813.
[3] *Smith* v. *Cameron*, 1879, 6 R. 1107; *Burns* v. *Burns*, 1879, 7 R. 355.
[4] *Macdonald & Elder* v. *Macleod*, Jan. 15, 1811, F.C.; Bell, Com. i. 338; ii. 73.
[5] Bell, Com. ii. 71, 72; *More* v. *Paxton*, 1766, Mor. 12259.
[6] *Baillie* v. *Nasmith*, 1674, Mor. 703; *Wight's Trs.* v. *Allan*, 1840, 3 D. 243; *Mags. of Dundee* v. *Taylor & Grant*, 1863, 1 M. 701.
[7] *Urquhart* v. *Douglas*, 1738, Mor. 10403; *Harvey* v. *Calder*, 1840, 2 D. 1095; *Smith* v. *Bell & Innes*, 1855, 17 D. 778.
[8] *Livingstone* v. *Livingstone*, 1886, 14 R. 43.
[9] 19 Geo. III. c. 20, s. 78.
[10] *Mackenzie* v. *Morrison*, 1791, Mor. 10413.
[11] *Irvine & Shepherd* v. *M'Laren*, 1829, 7 S. 317; but see 9 & 10 Vict. c. 226.
[12] 1 Vict. c. 41, s. 7.
[13] 8 & 9 Vict. c. 39.
[14] 33 & 34 Vict. c. 63.
[15] 14 & 15 George V. c. 16, s. 2.

for such alimentary allowances or for rates and taxes shall set forth the nature and the debt for which it has been used ; otherwise it shall not be effectual.[1] Wages payable in advance cannot be arrested. Wages of seamen or apprenticed seamen cannot be arrested.[2]

1347. Pensions granted by the Crown, because they are alimentary,[3] and salaries annexed to Crown offices, and to all offices in so far as they amount to no more than a reasonable allowance for the decent support of those who are named to them, are alimentary, and to that extent are not arrestable.

1348. Future debts, *i.e.* debts not due by the arrestee till after the execution of arrestment, are not arrestable. Claims which depend on the issue of a suit are not considered as future debts, and therefore they are arrestable ; for the sentence, when pronounced, goes back to the period at which the claim was first founded.[4]

An obligation *ad factum præstandum* is not arrestable.[5] Arrestments can only attach a debtor's interest *tantum et tale* as it stands in him.[6]

Section 8.—In whose Hands Arrestment may be made.

1349. The subjects to be arrested must not be in the hands of the common debtor or of his servant. They must be in the possession of one indebted to the common debtor. A leading principle in this connection is that the arrestment must not be used in the hands of one indebted to the common debtor's debtor.[7] Anyone who is bound to account to the common debtor, as a trustee or a judicial factor, is one in whose hands arrestment can be used ; and arrestment is competent in a trustee's hand although the estate be heritable, provided the common debtor's interest in the trust fund be moveable.[8] An arrestment was held inept which was used in the hands of two out of six trustees, a majority of the trustees having been declared to be a quorum.[9] "It is usual to serve schedules of arrestment on all the trustees ; and this form, whether necessary or not, ought to be observed, as the most effectual means of interpelling the trustees from paying to the beneficiary."[10] And although this liability to the beneficiaries is a joint one it has been held sufficient to arrest in the hands of each trustee the sum "due and addebted by you as trustee foresaid."[11]

As a general rule, a beneficiary under a trust who has raised an action against the trustees for payment of money alleged to be due to him under the trust, is not entitled to use arrestments on the dependence,

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[1] *M'Murchy* v. *Emslie & Guthrie*, 1888, 15 R. 375.
[2] Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 163.
[3] A. S., June 11, 1613 ; Bell, Com. i. 128.
[4] *Wardrop* v. *Fairholm & Arbuthnot*, 1744, Mor. 4860.
[5] *Blackwood* v. *Brown*, 1702, Mor. 689 ; *Ross* v. *Reston*, 1712, Mor. 690.
[6] *Chambers' Trs.* v. *Smiths*, 1878, 5 R. (H.L.) 151. [7] Bell, Prin. s. 2276.
[8] *Learmont* v. *Shearer*, 1866, 4 M. 540 ; *Chambers' Trs., supra.*
[9] *Black* v. *Scott*, 1830, 8 S. 367. [10] M'Laren on Wills, 851.
[11] *Gracie* v. *Gracie*, 1910, S.C. 899.

so as to prevent the trust funds coming into the hands of the trustees.[1]

1350. Arrestment is not to be used in the hands of a pupil or an idiot, but in the hands of his tutors and curators.[2] Arrestment may, however, be used in the hands of a minor. If the person in whose hands arrestments would be used have committed the general management of his affairs to commissioners, arrestments may be used in their hands, but not in the hands of a mere factor or steward, who is debtor to his employer, but not to the common debtor.[3] By s. 3 of the Mercantile Law Amendment Act, 1856,[4] a seller of goods was permitted to arrest the same while in his own hands or possession, but this is repealed by the Schedule of the Sale of Goods Act, 1893.[5] See the substituted provisions in ss. 38 to 43 of the Act.

1351. Arrestments may be used in the hands of corporations as well as of individuals; in the case of incorporated joint-stock companies, by using them in the hands of the treasurer or manager, or in the hands of the managers and directors:[6] in the case of companies registered under the Companies Acts, by arresting in the company's hands at their registered office:[7] in the case of railway companies, in the same way at the principal office, or in the hands of the secretary, or, if there be no secretary, of one of the directors. As to arrestments used in the hands of agents of a branch bank of funds lodged with the bank, see the cases undernoted.[8]

1352. Goods cannot be arrested in the hands of a servant, clerk, or steward of the common debtor; but where the common debtor had placed the goods in the hands of his law agent, and had gone abroad *animo remanendi*, they were held arrestable, though not removed from the client's house.[9] Arrestments in the hands of law agents of the proceeds of a bond due to a client were sustained.[10] Funds consigned in Court may be arrested in the clerk's hands, but only subject to the orders of the Court.[11] When the Court had granted special warrant to a party to uplift a sum consigned in bank upon a petition to that effect, an arrestment in the hands of the bank of a part of this sum by an agent in the process was held incompetent.[12] Arrestment of the landlord's furniture in the hands of the tenant of the house is incompetent.[13] Arrestment may be used in the hands of one employed to recover payment of bills, or to sell goods, or to recover money, for he is under obligation to do diligence and to account.[14] When goods have been appropriated to a specific purpose in the hands of another, or

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[1] *Mags. of Dundee* v. *Taylor & Grant*, 1863, 1 M. 701.
[2] Ersk. iii. 6, 4.
[3] *Campbell* v. *Faikney*, 1752, Mor. 742.
[4] 19 & 20 Vict. c. 60.
[5] 56 & 57 Vict. c. 71.
[6] See *Macdonald* v. *Telford*, 1881, 9 R. 211.
[7] Companies Act, 1908, s. 116.
[8] *Graham* v. *Macfarlane & Co.*, 1869, 7 M. 640; *Allan's Exr.* v. *Union Bank*, 1909 S.C. 206.
[9] *Brown* v. *Duff's Trs.*, 1850, 13 D. 149.
[10] *Telford's Exr.* v. *Blackwood*, 1866, 4 M. 369.
[11] *Pollock* v. *Scott*, 1844, 6 D. 1297.
[12] *Rennie* v. *Sang & Adam*, 1847, 10 D. 223.
[13] *Davidson* v. *Murray*, 1784, Mor. 761.
[14] Bell, Com. ii. 74.

where they have been consigned to an agent for the benefit of others, to whom notice is given so as to complete their right, arrestment is incompetent. And where goods were consigned with instructions to pay certain creditors named, who agreed to accept payment, the arrestment was held bad.[1]

1353. An arrestment is ineffectual if the arrestee is not in actual possession of the funds, *e.g.* a consignee before the goods have come into his hands, or a factor who has sold and delivered goods but not received payment.[2] An arrestment in the hands of one who has not the custody or possession of the goods, although he may have complete power over them, will be bad, but the arrestment will be sustained if the goods are in the possession of his servant as his mere hand.[3] Arrestments used in the hands of *A.* of sums due by him to *B.* will only apply to money due by *A.* as an individual.[4] This case shews also the great care which should be used in framing the schedule of arrestment, which is always strictly scrutinized by the Court.[5]

Section 9.—Effect of Arrestment.

1354. Arrestments interpel the arrestee from making payment to the common debtor, but arrestment on the dependence of an action is personal to the arrestee, and his heir requires to be interpelled by another arrestment, otherwise, if he is ignorant of the arrestment, he may with safety pay to his creditor.[6] But an arrestment continues to affect the subject after the death of the arrestee, and a furthcoming may be raised upon it against the heir while he holds the fund; and an arrestment after the arrestee's death in the hands of the heir is postponed to one which had been used in the hands of the ancestor.[7] Arrestments continue in force after the death of the common debtor, but an arrester before the death who had not obtained decree of furthcoming was postponed to a creditor who, after the death, had confirmed the debt arrested as executor-creditor to the deceased.[8] An arrestment before the debtor's death is preferable to a later arrestment also before the debtor's death, though the latter be followed by the first decree of furthcoming, and likewise to an assignation not intimated during the debtor's life.[9] An arrestment for a Crown debt transfers to the Crown, preferably to all other creditors, all right to and interest in the arrested fund competent to the Crown debtor, to such extent as may be requisite to satisfy and pay the entire debt due to the Crown, including interest and expenses, and the arrestee may pay without furthcoming.[10] An arrestment subsists

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[1] *Stalker* v. *Aiton*, 1759, Mor. 745.
[2] Bell, Com. ii. 75.
[3] *Hunter* v. *Lees*, 1733, Mor. 736.
[4] *Burns* v. *Gillies*, 1906, 8 F. 460.
[5] *Henderson's Trs.*, 1831, 9 S. 618; *Hay* v. *Dufourcet & Co.*, 1880, 7 R. 972; *Lochhead* v. *Graham*, 1883, 11 R. 201, per L. Kinnear at p. 204.
[6] Ersk. iii. 6, 11.
[7] *E. Aberdeen* v. *Scot's Crs.*, 1738, Mor. 775.
[8] *Carmichael* v. *Hardy*, 1742, Mor. 2791; *Wilson & M'Lellan* v. *Fleming*, 1823, 2 S. 383, N.E. 430.
[9] Bell, Com. ii. 72.
[10] 19 & 20 Vict. c. 56, s. 30.

after the death of the arrester, who arrests for his heirs as well as for himself.[1] The arrestment subjects the arrestee to a claim for the value of the arrested fund if he part with it, but it does not entitle the creditor to vindicate it from third parties who have acquired it *bona fide*. Arrestment used on the dependence remains in force after a decree of absolvitor, where an appeal has been taken to the House of Lords.[2] But the Court there recalled on equitable considerations arrestments used after the decree of absolvitor. Wherever a decree is suspended, arrestments on it may be loosed though laid on before the suspension.[3] A trustee, after arrestments have been used in his hands, is not entitled to make advances to the truster.[4] When arrestment to found jurisdiction has been used, and the foreign owner has thereby been made a party to the process, the arrestment is spent, and the arrestee is no longer, as in a question with the arrester, under any obligation to retain in his hands the moveables which the arrestment affected.[5] It has been held that a single arrestment is not a sufficient ground for raising a multiplepoinding, and that the proper remedy of the arrestee is a suspension of a threatened charge.[6] As to arrestments in bankruptcy, see BANKRUPTCY, and the Bankruptcy (Scotland) Act, 1913.[7]

SECTION 10.—BREACH OF ARRESTMENT.

1355. If the arrestee, notwithstanding the arrestment, make payment or delivery to the common debtor, he will be liable to pay the debt over again to the arrester, and is liable criminally for breach of arrestment. A breach of arrestment is not quite parallel with a breach of interdict, but may still be treated as a contempt of Court.[8] An arrestment executed to attach the effects of a debtor as in the hands of a person out of Scotland will not serve to interpel such person from paying to the original creditor unless proof be made that he or those having authority to act for him were previously in the knowledge of such arrestment having been so used.[9] An arrestee who has paid the debt by cheque before the arrestment is not bound to stop the cheque. The acceptance of the cheque extinguishes the debt and leaves nothing open to arrestment.[10]

SECTION 11.—FURTHCOMING.

1356. An arrestment is only inchoate diligence. Though it is not merely prohibitory like an inhibition, yet it is a step of diligence which, to be completed, requires a furthcoming, which is an action raised by the arrester against the arrestee to have him ordained to make the

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[1] Ersk. iii. 6, 11. [2] *Countess of Haddington* v. *Richardson*, 1822, 1 S. 362, N.E. 387.
[3] *White*, 1741, Mor. 802. [4] *Bank of Scotland* v. *M'Donell*, 1826, 4 S. 811, N.E. 804.
[5] *North* v. *Stewart*, 1890, 17 R. (H.L.) 60.
[6] *Mitchell* v. *Strachan*, 1869, 8 M. 154; but see *Dill, Wilson & Muirhead* v. *Ricardo's Tr.*, 1885, 12 R. 404.
[7] 3 & 4 Geo. V. c. 20, s. 10. [8] *Inglis & Bow* v. *Smith & Aikman*, 1867, 5 M. 320.
[9] 19 & 20 Vict. c. 91, s. 1. [10] *Leggat Bros.* v. *Gray*, 1908 S.C. 67.

subject or debt arrested furthcoming. It is competent both in the Court of Session and in the inferior Courts. A furthcoming may be raised in the Sheriff Court where the fund is situated, or in that to whose jurisdiction the arrestee is subject, although the common debtor may not reside within either Sheriffdom.[1] The common debtor as well as the arrestee must be called as defender, but in a furthcoming in the Sheriff Court, it is unnecessary, if the arrestee be subject to the jurisdiction, to found jurisdiction against the common debtor.[2] The Court, however, must be satisfied that he has received "fair notice" that his property was being taken in execution. The grounds of action are (1) the debt due by the common debtor to the arrester; (2) the arrestment; and (3) the debt due by the arrestee to the common debtor.[2] When arrestment has been used upon the dependence it is unnecessary to arrest in execution.[3]

1357. The conclusions of the action are that the arrestee and common debtor for his interest should be ordained to make furthcoming, payment and delivery of the sum owing by the arrestee to the common debtor, and arrested in his hands by the pursuer, or of so much thereof as will pay the debt and the expenses of the arrestment. There may be a conclusion for warrant to sell arrested goods, and to apply the proceeds in extinction of the debt. The expenses of the furthcoming cannot be made good out of the arrested subjects,[4] but the pursuer gets decree therefor against the common debtor. The pursuer may, however, obtain decree against the arrestee for the expenses occasioned by his opposition. The sum recovered from the arrestee includes the original debt, interest from the date of arrestment, and the expenses of constituting the debt and arresting.

1358. The pursuer must have as his title a decree or other liquid ground of debt.[5] Both the arrestee and the common debtor may lodge defences, as well as any person having an interest in the subjects arrested. The arrestee is not allowed to dispute the debt due by the common debtor to the arrester,[6] but he may plead the invalidity of the arrestment, or that no subjects have been arrested in his hands, or that the common debtor has not been duly called. He may, in short, plead every defence against the arrester which he could have pleaded against the common debtor. He has an interest to see that the common debtor has been made a party to the proceedings, and may plead that the debt in respect of which the arrestment proceeded was not duly constituted against the common debtor, on the ground of the latter not being subject to the jurisdiction of the Court.[7] "The arrestee may refer the existence of the debt to the common debtor's oath, unless he is bankrupt

[1] Sheriff Court Act, 1907 (7 Edw. VII. c. 51), r. 128, and ss. 6 (*g*), 45; Small Debt Act, 1837 (1 Vict. c. 41), s. 9.
[2] *Leggat Bros.* v. *Gray*, 1912, S.C. 230.
[3] *Abercrombie* v. *Edgar & Crerar, Ltd.*, (O.H.) 1923, S.L.T. 271.
[4] *May* v. *Malcolm*, 1825, 4 S. 76. [5] *Cunninghame* v. *Cunninghame*, 1837, 15 S. 687.
[6] *Houston* v. *Aberdeen Town and County Banking Co.*, 1849, 11 D. 1490.
[7] *Smyth* v. *Ninian*, 1826, 5 S. 8.

or the arrester's right is founded on an intimated assignation." [1] The arrestee may deny that he is indebted to the common debtor, and, according to Erskine, may refer this defence to the common debtor's oath, which will be effectual against the arrester.[2] The common debtor may defend on the ground that the arrestment is invalid or that he is not indebted to the arrester. The procedure in a furthcoming is the same as in an ordinary action. Decree completes the arrester's right to the subjects arrested, and excludes all co-creditors from poinding them afterwards. The decree, whatever the nature of the subject arrested may be, is a judicial assignation to the arrester of that subject even before the sentence is carried into execution.[3]

Section 12.—Competition of Arrestments.

1359. Preference is given to the arrestment which is first in date, even though the difference be of hours only, provided the precise hours are marked in the executions. But where two arrestments were used on the same day, and the execution of one bore that it had been laid on between six and eight p.m., and the execution of the other did not specify any hour, the former was, in the absence of proof, preferred.[4] If the prior arrester, however, neglects to prosecute his diligence for such a time as may reasonably infer the abandoning of it, he loses his preference, and a subsequent arrester who has obtained decree of furthcoming will be preferred. Three years was held not to be such *mora* as inferred abandonment.[5] Preference is given to arrestments in the order of priority "whether the arrestment be on the dependence, or on a decree, or for debts not yet due, or on debts already payable, provided dependency shall have been closed, or the debt have become payable before the issue of the competition." [6] Although an arrester using arrestments subsequent to a previous arrestment *ad jurisdictionem fundandam* may not defeat the purpose of that arrestment by enforcing furthcoming of the fund arrested before citation has followed on that arrestment, yet citation having followed, the arrestment to found jurisdiction, having served its purpose, flies off, and the rights of the parties to the fund fall to be determined according to the ordinary rules of priority.[7]

Section 13.—Competition between Arresters and Assignees.

1360. An assignation granted by the common debtor, and completed by intimation before arrestment, is preferable to the arrestment, because the intimated assignation divests the common debtor: but where the arrestment is used before intimation, the arrester is preferred to the assignee, because the arrestment renders the subject arrested litigious, after which it cannot be affected by any voluntary deed of the debtor.[8]

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[1] Mackay, Manual, 381. [2] Ersk. iii. 6, 16. [3] *Ibid.*, 17.
[4] *Hertz* v. *Itzig*, 1865, 3 M. 813; 37 Sc. Jur. 365.
[5] *Lister* v. *Ramsay*, 1787, Mor. 824. [6] Ersk. Prin. iii. 6, 9.
[7] *Stillie's Trs.* v. *Stillie*, 1898 (O.H.), 6 S.L.T. 173. [8] Ersk. iii. 6, 19.

If the intimation is of even date with the arrestment, they are to be preferred *pari passu* if the hour in which they were respectively used do not appear.[1]

Section 14.—Recall and Restriction of Arrestments.

1361. The Lord Ordinary before whom any summons containing warrant to arrest shall be enrolled, or before whom any action, on the dependence whereof letters of arrestment have been executed, has been enrolled, and the Lord Ordinary on the Bills in vacation, on petition duly intimated to the pursuer (to which petition answers may be ordered) may recall or restrict such arrestment on caution or without caution, and dispose of the question of expenses, and his judgment shall be subject to the review of the Inner House by a reclaiming note lodged within ten days.[2] By s. 21 of the same statute, the Sheriff from whose books a warrant of arrestment has been issued, on petition duly intimated to the creditor, may recall or restrict such arrestment on caution or without caution, provided that the Sheriff shall allow answers to be given in to the said petition, and shall proceed with the further disposal of the cause in the same manner as in summary causes, and his judgment shall be subject to review in the Court of Session. The arrestment may be recalled on caution or without caution. The caution may guarantee that the subjects attached in the hands of the arrestee shall be made furthcoming, or that the debt sued for, with interest and expenses, shall be paid if found due. When the arrestments are loosed, the arrestee may safely pay to his creditor.

1362. The general rule is that the right to petition for recall of arrestments is open to the common debtor only, and not to the arrestee. Where, however, the subject arrested is a corporeal moveable, or a ship undelivered and still in the builder's yard, which the arrestee does not admit to be the property of the common debtor, he may petition for recall, and unless the arrester can establish a *prima facie* case that the subject arrested is the property of the common debtor, may obtain a recall.[3] But where the arrestee admits that the corporeal moveable is the property of the common debtor, but alleges that it is subject to claims at his instance, he may not petition for recall. When the subject arrested is not a corporeal moveable, but is a debt or sum of money, the general rule applies that the arrestee may not petition for recall.[4] A third party (that is, a party other than the arrestee or the common debtor) may not petition for recall. He must seek his remedy by some other form of process.[5]

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[1] *Inglis* v. *Edward*, 1630, M. 2773.

[2] Personal Diligence Act, 1838 (1 & 2 Vict. c. 114), s. 20.

[3] *Duffus and Lawson* v. *Mackay*, 1857, 19 D. 430; *Schultz* v. *Robinson & Niven*, 1861, 24 D. 120; *Grant* v. *Grant*, 1867, 6 M. 165.

[4] *Barclay, Curle & Co.* v. *Laing & Sons, Ltd.*, 1908 S.C. 82.

[5] *Brand* v. *Kent*, 1892, 20 R. 29; "*Nordsoen*" v. *Mackie, Koth & Co.*, 1911 S.C. 172.

1363. A petition for recall of arrestments is not a proper process in which to try the question of the validity of the arrestments. In *Vincent* v. *Chalmers & Co.'s Tr.*,[1] the petitioner, on the averment that arrestments had been wrongously laid on, the goods arrested having been previously sold and delivered to him by the common debtor before the date of the arrestments, petitioned for their recall. The respondent averred that the sale founded on was not *bona fide*, but was simulated with the object of defeating his diligence. It was held that the question truly being whether the arrestments were valid or not, could not be tried in a petition for recall, but only in an action of furthcoming. The Lord President observed : " The petition contains allegations of fraud, and involves a proof at large. Such a question can only be tried in the furthcoming, which is the appropriate action for deciding all such questions. In an application of this kind we must be able to say that arrestments should never have been used at all, or else to say that they should be recalled on caution being found. We cannot allow a proof." Where the common debtor petitioned for recall on the ground that the arrested funds were alimentary, the Court determined the question whether they were alimentary and arrestable, and recalled the arrestments, indicating, however, that a furthcoming would have been the proper process for deciding the question, but as no furthcoming had been raised and a twelvemonth had expired since the use of the arrestments, they might decide the matter in the petition for recall.[2]

1364. The Personal Diligence Act of 1838 requires that the petition for recall be duly intimated to the pursuer, but in special circumstances intimation may be dispensed with.[3] Arrestments may be recalled by a letter under the hand of the arresting creditor, and cannot afterwards be revived so as to compete with a second arrestment.[4] As stated above, a third party is not entitled to obtain recall of arrestments on the dependence of an action, on the ground that the subjects alleged to have been arrested truly belong to him unless, perhaps, he can instantly verify that the subjects are his and intimates the petition to the common debtor ; a proof cannot be allowed. If the subjects arrested belong to the common debtor, then the arrestments are valid, and ought not to be recalled. But if they belong to the petitioner, then the arrestments in no way affect him, and there is therefore no need to recall them, for they do not touch the fund. A petition for recall of arrestments always assumes that they have been well laid on, so as to attach certain specific debts, or the debts generally which the arrestee may owe to the common debtor, and the Court is prayed to interfere as a Court of Equity to prevent an oppressive use being made of the arrestments.[5] The undernoted cases illustrate the grounds which will justify the recall of

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[1] 1877, 5 R. 43.
[2] *Lord Ruthven* v. *Drummond*, 1908 S.C. 1154.
[3] *Mellis*, 1872, 9 S.L.R. 630.
[4] *Ewing, May & Co.* v. *Johnstone & Macquoid*, Dec. 9, 1813, F.C.
[5] *Brand* v. *Kent*, 1892, 20 R. 29.

arrestments.[1] In *Buchanan* v. *Black*,[2] L. Rutherfurd Clark expressed the opinion that the word "enrolled," under the 20th section of the Personal Diligence Act, 1838, above referred to, implied that defences in an ordinary action must be lodged before the petition can be presented. In the same case the Court disapproved of the making up of an independent record on a separate petition, holding that the proper course in a case of urgency was to make a motion in the cause.

1365. A petition for recall of arrestments may competently be presented to the Inner House,[3] even when the process depends before a Lord Ordinary, for the Act of 1838 in conferring power on the Lord Ordinary to recall arrestments did not deprive the Inner House of the jurisdiction previously possessed by it.[4] In cases of great urgency, the Court may be moved to recall arrestments before defences are lodged. The Lord Ordinary on the Bills in Vacation may recall arrestments used on the dependence of a summons even if it has not been called or enrolled before a Lord Ordinary.[5] The Court of Session may loose arrestments laid on by an inferior Court.[6]

1366. When arrestments are recalled, expenses must either be obtained or reserved; and when an interlocutor was pronounced recalling the diligence and allowing extract, without disposing of or reserving the question of expenses, it was held incompetent to move for expenses either in the petition or in the relative action.[7] When arrestments are rightly laid on, the expenses of using the arrestments do not enter into the expenses of the original action. Each party must bear his own expenses in getting the arrestments out of the way. When the defender tenders the sum decerned for and the expenses of the action, that must be accepted as a satisfaction of the decree. The arresting creditor is not bound to discharge the arrestments voluntarily, or to grant a letter which will entitle the arrestee to pay or hand over the sum arrested, and is not liable in the expenses of the proceedings which the defender may have to take for that purpose.[8] The matter of the expenses of a petition for recall is in the discretion of the Court. The Court recalled arrestments of a ship to the effect of allowing the ship to sail, upon the petitioner, who was a mortgagee in possession, consigning a sum sufficient to cover the claim of the arrester as a surrogatum for the ship.[9] In another case, the Court recalled arrestments of a ship, and prohibited further arrestments, on the petitioners finding caution or consigning a

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[1] *Hamilton* v. *Bruce's Trs.*, 1857, 12 D. 745; *Neilson* v. *Stewart*, 1862, 24 D. 956; *Cullen* v. *Buchanan*, 1862, 24 D. 1280; *Rintoul & Co.* v. *Bannatyne*, 1862, 1 M. 137; *Macfarlane* v. *Sanderson*, 1868, 40 Sc. Jur. 189; *Macdonald* v. *Stewart's Trs.*, 1871, 9 S.L.R. 72; *Wilson* v. *Mackie*, 1875, 3 R. 18; *Symington*, 1875, 3 R. 205; *James*, 1886, 13 R. 1153; *Millar*, 1907, 15 S.L.T. 205.

[2] 1882, 9 R. 926.

[3] *Matthew* v. *Patullo*, 1858, 21 D. 18.

[4] *Hart*, 1864, 3 M. 336; *Gardiner* v. *Blackwood*, 1866, 1 S.L.R. 136.

[5] 1 & 2 Vict. c. 114, s. 20; *Morison* v. *Rennie*, 1847, 10 D. 146.

[6] *Drummond & Dobie* v. *Boyd*, 1834, 12 S. 454.

[7] *Dobbie* v. *Duncanson*, 1872, 10 M. 810.

[8] *Roy* v. *Turner*, 1891, 18 R. 717.

[9] *Stewart* v. *Macbeth & Gray*, 1882, 10 R. 382.

certain sum.[1] As to loosing of arrestments under the Small Debt Act, see 1 Vict. c. 41, s. 8.

1367. A cautioner in a general loosing of arrestments, being a cautioner *judicatum solvi*, is entitled to the privileges of an ordinary cautioner, and may plead that the claim of the arrester against the common debtor is not well founded.[2]

Section 15.—Wrongous Use of Arrestments.

1368. As a party is entitled to raise an action to recover payment of a debt, so he is entitled to use arrestments for the same end. A party complaining of the arrestments as illegal cannot recover damages unless he shew that the arrester acted maliciously and without probable cause. As arrestments are obtained without special averments in support of the application for them, damages are not due unless the diligence is irregular, or has been used maliciously and without probable cause ; whereas in the case of a warrant for the use of particular diligence, such as interdict, requiring special averment in the application for a warrant, it is enough to shew that the diligence was wrongful or illegal, without shewing that it was exercised maliciously and without probable cause.[3] Damages may be recovered whether the arrestment be on the dependence, or in execution, or to found jurisdiction. If an arrestment is used without warrant, or if the warrant be used against the wrong person, the complainer may recover damages without shewing malice and want of probable cause, or even special damage, seeing he has sustained a legal wrong. [See Abuse of Civil Process, *supra*.]

Section 16.—Prescription of Arrestments.

1369. Arrestments for sums not exceeding £20 prescribe in three months unless from time to time renewed.[4] In all other arrestments the period is three years. The period was originally five years,[5] but by the Personal Diligence Act, 1838, the period was reduced to three years.[6]

The necessity for " pursuing or insisting on " arrestments within the three years received forcible illustration in the case of *Jameson* v. *Sharp*.[7] This period is reckoned from the date of using arrestment, in the case of arrestments in execution, and from the date of the decree in the action, when raised on the dependence of such action.

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[1] *M'Phedron & Currie* v. *M'Callum*, 1888, 16 R. 45.
[2] *MacDougall's Tr.* v. *Law*, 1864, 3 M. 68.
[3] *Wolthekker* v. *The Northern Agricultural Co.*, 1862, 1 M. 211 ; *Kennedy* v. *Police Commrs. of Fort William*, 1877, 5 R. 302.
[4] 1 Vict. c. 41, s. 6 ; Sheriff Courts Act, 1907 (7 Edw. VII. c. 51), s. 45.
[5] Act 1669, c. 9.
[6] 1 & 2 Vict. c. 114, s. 32.
[7] 1887, 14 R. 643.

Section 17.—Arrestment to Found Jurisdiction.

1370. A foreigner may be subjected to the jurisdiction of the Supreme Court by the use of arrestments *ad fundandam jurisdictionem.* The Sheriff's jurisdiction has been extended to any action against a foreigner competent in the Sheriff Court where the defender is a person not otherwise subject to the jurisdiction of the Courts of Scotland, and a ship or vessel of which he is owner or part owner or master, or goods, debts, money or other moveable property belonging to him have been arrested within the jurisdiction.[1]

The Court thus expressed itself in *Cameron* v. *Chapman*:[2] "It is not necessary to inquire on what principle the custom is founded of arresting moveables to found jurisdiction against their owner, being a foreigner. It is plainly in opposition to the general doctrine both of the Roman law and modern jurisprudence, both of which admit the maxim, '*actor sequitur forum rei.*' It was borrowed in Scotland from the law of Holland, where, as Voet observes, it had been introduced contrary to principle, from views of expediency, and for the encouragement of commerce."

The arrestment may be by warrant of the Sheriff, or by letters passing the Signet on a warrant from the Bill Chamber. The arrestment should be used before the action is raised. It is not enough that it be executed before defences are lodged.[3]

1371. Although it was in one case held enough to sustain the arrestment that there was *prima facie* evidence of funds in the hands of the arrestee, and a preliminary defence, that it would be found on investigation that there were no funds, was not sustained,[4] yet where the defender pleaded no jurisdiction, because at the date of the arrestment the arrestees were not debtors to the defender, the Court allowed a proof, which disclosed that at the date of the arrestment the balance on an accounting was in favour of the arrestees. The Court sustained the plea of no jurisdiction, although the pursuers maintained that it was enough that at the date of the arrestment there was a relationship between the defender and the arrestees, which made the latter liable to an accounting, even though ultimately it should be found that there was a debit balance against the defender. Lord M'Laren thus expressed himself: "I know of no decision which has gone the length of excluding inquiry into the state of the cash account between the parties for the purpose of seeing whether there are funds subject to arrestment."[5]

1372. For the purpose of founding jurisdiction, it seems to be immaterial how small the sum arrested may be. £1, 8s. 6d. has been held

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[1] 7 Edw. VII. c. 51, s. 6.

[2] 1838, 16 S. 907.

[3] L. Watson in *North* v. *Stewart*, 1890, 17 R. (H.L.) 60, explaining *Walls' Trs.* v. *Dryman*, 1888, 15 R. 359.

[4] *Douglas* v. *Jones*, 1831, 9 S. 856.

[5] *Napier, Shanks & Bell* v. *Halvorsen*, 1892, 19 R. 412; see also *Baines & Tait* v. *The Compagnie Générale des Mines d'Asphalte*, 1879, 6 R. 846.

enough.[1] A contingent claim against a bankrupt estate, or an interest in that estate, will suffice to found jurisdiction ;[2] but if there are no assets in the hands of the trustee on the bankrupt estate against whom the defenders had a contingent claim, the plea of no jurisdiction will be sustained.[3] The point of time to ascertain whether anything has been arrested is the date of citation upon the summons. If at that date there is a valid arrestment against the defender, and the summons is duly served, the action has commenced, and the jurisdiction of the Court over the defender in that suit is fully constituted. When he has been competently brought into Court, he cannot thereafter escape from its jurisdiction by reason of circumstances supervening which, had they originally existed, would have exempted him from its process.[4] The subjects arrested must be capable of attachment by diligence in execution, and so the arrestment of books and documents of no mercantile value will not found jurisdiction.[5] If jurisdiction be once founded, the decree is not limited in the action to the sum or effects arrested. They will ground a petitory action to any amount, however great.[6]

1373. An arrestment against a foreign firm of John Hare & Co. was held competently laid on in said firm-name alone, but an arrestment of funds not due by the arrestee but by a firm of which the arrestee was a partner, was held to be bad ;[7] and similarly arrestment of funds not due to the common debtor but to a partnership of which he is a member is bad. A ship can be arrested to found jurisdiction against a part owner, but not after it has left port.[8]

1374. An arrestment of funds as belonging to the executors-nominate of a deceased foreigner, but to which fund the executor had not confirmed, was held to be inept as the ground of a decree of constitution and payment against the executors.[9] The mode of proceeding against the funds of a deceased debtor whose executors are foreigners is to arrest to found jurisdiction, and then to raise an action concluding for decree *cognitionis causa tantum*. On this ground of debt the creditor may be confirmed executor-creditor.[10] Arrestments against executors-nominate unconfirmed are ineffectual unless the property arrested has been specially bequeathed to them, such bequest being considered a special assignation within the meaning of the Act 1690, c. 26.[11] When a foreign executor has confirmed in Scotland, arrestment of executry funds gives

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[1] *Shaw* v. *Dow & Dobie*, 1869, 7 M. 449.
[2] *Lindsay* v. *L. & N.W. Rly. Co.*, 1860, 22 D. 571.
[3] *Wyper* v. *Carr & Co.*, 1877, 4 R. 444.
[4] *North* v. *Stewart*, 1890, 17 R. (H.L.) 60.
[5] *Trowsdale's Tr.* v. *Forcett Rly. Co.*, 1870, 9 M. 88; *Millar & Lang* v. *Poole*, 1907, 15 S.L.T. 76.
[6] *Kirkpatrick* v. *Irvine*, 1838, 16 S. 1200 ; *Lindsay* v. *L. & N.W. Rly. Co.*, 1860, 22 D. 571 ; 3 Macq. 107.
[7] *Parnell* v. *Walter*, 1889, 16 R. 917.
[8] *Carlberg* v. *Borjesson*, 1877, 5 R. 188, affd. H.L. 265.
[9] *Houston* v. *Stirling*, 1824, 2 S. 672, affd. 1 W. & S. 199.
[10] *Ashton, Hodgson & Co.* v. *Mackrills*, 1773, Mor. 4835.
[11] *Innerarity & Co.* v. *Gilmore*, 1840, 2 D. 813.

jurisdiction, but not otherwise. The executor being confirmed in this country is *quoad* the funds a Scottish executor.[1] But the Court may refuse to entertain proceedings in this country against a foreign executor where proceedings here would be attended with inconvenience.[2] Where a person resident in England intromitted with a Scottish executry estate, the arrestment of private funds in Scotland was held sufficient to found jurisdiction against her in a question between her and beneficiaries claiming a share of the executry estate.[3] On the death of a defender against whom jurisdiction has been founded by arrestment, arrestments must be used of new to found jurisdiction against his executor if resident abroad.[4] So where an action of transference was raised against the two executors-nominate of a deceased Englishman who had neither heritable nor moveable property in Scotland and both executors resided abroad, although one of them had heritable estate in Scotland, it was held that the Court had no jurisdiction.[5]

1375. After the defender has been subjected to the jurisdiction of the Court by arrestment, the pursuer, if he wishes to arrest in security, must arrest on the dependence of the action or by separate letters, as otherwise the arrestee may pay away the funds arrested to found jurisdiction.[6] An arrestment to found jurisdiction is of no avail to anyone except to him who has used it,[7] and if another action has to be raised there must be a new arrestment. As arrestment founds jurisdiction against the arrestee only in the particular action for the purpose of which it is used, if in such an action new pursuers are introduced by amendment or otherwise, the plea of no jurisdiction will be sustained.[8] [See JURISDICTION.]

1376. Arrestments do not confer on the Courts jurisdiction to entertain declaratory conclusions,[9] but jurisdiction founded by arrestment extends to the pronouncing of decrees *ad factum præstandum*.[10] There is no fixed time within which an arrestment to found jurisdiction must be followed by a summons.[11]

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[1] *M'Morine v. Cowie*, 1845, 7 D. 270.
[2] *Tulloch* v. *Williams*, 1846, 8 D. 657.
[3] *Macadam* v. *Macadam*, 1873, 11 M. 860.
[4] *Cameron* v. *Chapman*, 1838, 16 S. 907.
[5] *Mackenzie* v. *Drummond's Exrs.*, 1868, 6 M. 932.
[6] *North* v. *Stewart*, 1890, 17 R. (H.L.) 60.
[7] *Cameron, supra.*
[8] *Andersen* v. *Harboe*, 1871, 10 M. 217.
[9] *Williams* v. *Royal College of Veterinary Surgeons*, 1897 (O.H.), 5 S.L.T. 208.
[10] *Powell* v. *Mackenzie & Co.*, 1900 (O.H.), 8 S.L.T. 182.
[11] *Craig* v. *Brunsgaard, Kjostersed & Co.*, 1896, 23 R. 500.

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PRINTED IN GREAT BRITAIN BY NEILL AND CO., LTD., EDINBURGH.